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CHAIRMAN'S PAGE

All signs point to a stimulating, busy, and exceedingly well-attended convention. I look forward to greeting all of you at the Willard and to your participation in the panels and discussions that can help to improve the administrative process.

I hope everyone will examine carefully the committee reports that comprise the bulk of this issue of the Bulletin. Reflected in the reports are thousands of man-hours of careful consideration by approximately 600 Section members who have been engaged in committee work during the past year. Many of the reports contain vital background information for the administrative practitioner and thorough examinations of recent developments in agency practices, as well as proposals for resolutions to be submitted by the Section to the House of Delegates. As one reads the reports, he is bound to become increasingly aware of the tremendous scope, magnitude and consequences of administrative law today and of the important tasks and opportunities that lie ahead for our Section.

On a recent tour through the late issues of the *Index to Legal Periodicals* I paused to note the entries listed under "Administrative Law" and "Administrative Procedure." Standing back from the trees to look at the forest, I pondered for a moment on both the number and the diversity of the trees. No one can say that the administrative process currently lacks scholarly attention. One does not have to travel far to seek the reasons for this wave of attention. Many critics and philosophers inveigh against the crisis theory of democratic government, but whatever the merits of that theory it is observable that public attention and public action in this nation are very often the product of crisis. Events of the past year have heightened the aura of crisis that surrounds the administrative process, and this condition explains the onslaught of scholarly attention that is now being focused upon it. Now, the crisis theory of government possesses no alternative to planned governmental action unless the crisis produces policy and means for implementing policy. The administrative process has had more than enough attention and drama to produce significant improvements. And yet as this year draws to a close there is no guarantee that lasting improvement will result. As I see it, friends of the administrative process have two duties: one, to insure that

the impetus afforded by the current crisis does produce lasting improvements, and two, to insure that some residual institutions and forces will continue to urge improvement when the atmosphere of crisis dwindles. This Section can do much to achieve both of these goals.

My perusal of the *Index* produced some other thoughts as well. One of them is that there is far too much attention focused on "The Administrative Process," as if it were a monolith. Perhaps because law school courses in administrative law focus primarily on procedural elements and upon judicial review an atmosphere of generality still envelops much of the study of the administrative process. As I have often said, nothing is clearer than that the ramifications of the administrative process vary tremendously between institutional settings. I, for one, will not be happy until the *Index* includes a far greater proportion of studies dealing with administrative decision-making within the context of a given agency. Fortunately, this Section constitutes an important weapon in this battle against generalization that is too often meaningless. Our organization into committees with particularized mandates governing particular areas of concern should be a source of gratification, for only by particularized study can meaningful conclusions be drawn and effective action be taken. I hope that this organization for particular scrutiny will always continue and will always increase in effectiveness.

It has been an honor and a cherished experience to serve as your Chairman for the past year and to join with you, now and in the future, in striving to improve the machinery and substance of administrative law.

EARL W. KINTNER, *Chairman*

PROGRAM FOR ANNUAL MEETING—1960

SECTION OF ADMINISTRATIVE LAW

EARL W. KINTNER, *Chairman,* Washington, D. C.
BERNARD J. GALLAGHER, *Chairman,* Annual Meeting Committee
Hotel Willard, Washington, D. C.

Saturday, August 27

12:00 Noon—Luncheon of Council and Committee Chairmen
2:00 P.M.—Meeting of Council and Committee Chairmen

Sunday, August 28

10:00 A.M.—Meeting of Council and Committee Chairmen
2:00 P.M.—Meeting of Council and Committee Chairmen

Monday, August 29

10:00 A.M.—General Session of the Section
The Session will feature a program on: Administrative Law Developments Around the World
MODERATOR—Chief Judge E. Barrett Prettyman, U. S. Court of Appeals for the District of Columbia Circuit
PANELISTS:
Dr. Jose R. Chiriboga, Ambassador Extraordinary and Plenipotentiary, Ecuador
Professor H. W. R. Wade, Trinity College, Cambridge, England
Distinguished guests representing other nations of Asia, Africa, Europe, and America

Tuesday, August 30

10:00 A.M.—General Session—Committee Reports and Recommendations
2:00 P.M.—Continuation of General Session
Address: Hon. Tom C. Clark, Associate Justice of the Supreme Court
Completion of Committee Reports and Recommendations
Election of Officers and Council Members
6:30 P.M.—Reception and Buffet Dinner

REPORT OF THE COMMITTEE ON THE ADMINISTRATIVE PROCEDURE ACT[1]

The undersigned was appointed Chairman of this Committee by letter of November 25, 1959, from Section Chairman Earl Kintner. Subsequent sporadic correspondence with those who sit in the seats of the mighty revealed the singular fact that no one seemed to know the jurisdiction or functions of the Committee. The best thought came from a former Chairman who stated that the Committee was on a standby basis and that it was to take action only when specific matters were referred to it. No matters had been so referred to the Committee for the past two years. Your Chairman was also informed that the Section Chairman had been advised of the above views concerning this Committee's jurisdiction and had raised no questions.

Encouraged by this vigorous start, your Chairman took no action. Meanwhile, replies to a request for suggestions on the Committee's work began to trickle in. About thirty such replies were received with about half of them containing concrete suggestions for Committee action. These suggestions ranged from proposals for wholesale recodification to an objection against the practice of certain agencies requiring a "permit" before an attorney is allowed to appear for a client. One member disapproved of the original Administrative Procedure Act and all of its modifications through and including S. 1070. Another member felt that the processes and procedures customarily used by the Interior Department were causing grievous and continuing injury to the entire field of Administrative law. Most of the comment fell under one of the following headings:

(a) Role of the Hearing Examiner (he should have greater importance in the decisional process).

(b) Judicial Review (here comment covered the entire spectrum of pro and con opinion on this subject).

(c) Publication of Information (conflict between those who fear that not all the evidence will be *on the record* and others who be-

[1] This Committee has some 100 members. It should be clear then that this is a *Chairman's Report* rather than a *Committee Report.* A real effort has been made, however, to reflect the news of the 15% who troubled to express a view. The Chairman thanks them as well as the additional 15% who sent expressions of interest and friendship.

lieve that agency investigative reports and working papers are entitled to *privilege*).

(d) The Hector Memorandum (practically everybody thought the Committee should inquire into this document).

In view of the many years of talk about amending the APA, the above headings were highly predictable and thus, somewhat disappointing. Without exception, however, those who commented did so thoughtfully. Even though the subject of comment was not new, the approach often was. Together, the members' comments contributed substantially to the Chairman's education. I regret that space limitations make it impossible to present these views in detail.

The mid-winter Meeting in Chicago last February provided an occasion for your Chairman to meet two of the Vice Chairmen and a half-dozen Committee members. We explored the jurisdiction and functions of this Committee at several meetings without reaching any definite conclusions. The consensus within this small group seemed to be that too many Committees of this and other sections were concerned with the Administrative Procedure Act.

We sought the advice of Section Chairman Earl W. Kintner. Chairman Kintner felt that this large Committee could be made a workable unit by the creation of an Executive Committee and several working Subcommittees responsible to it. The Section Chairman thought that the substantive work of the Committee should be directed to the examination and possible criticism of S. 1070. The Committee might also profitably compare S. 1070 and S. 2849.

After due consideration, these steps did not seem feasible in the life remaining to this Committee after the February 1960 meeting. With limited secretarial assistance, it did not appear to me to be practicable to embark on the extensive correspondence necessary to create, organize and assign functions to an Executive Committee and various Subcommittees. The idea obviously has merit and is hereby referred to the Council for future consideration. A *caveat,* reorganization may cure inefficiency due to great numbers but it cannot change the wide geographical distribution of members.

As to the examination of S. 1070, this project seemed particularly futile since the Section and the Association are already committed to support the bill before Congress.[2] Criticism by this Com-

[2] Robert Benjamin, Esq., a member of this Committee and Chairman of the Association's Special Committee on the Code of Administrative Procedure made this position clear in a letter to your Chairman on February 12, 1960.

mittee at this stage would be a form of sabotage. In addition, at least a half-dozen Association Committees, special and regular, are considering S. 1070. At the February 1960 Council meeting, the Section Chairman appointed a Special Committee to consider S. 2849, thus effectively removing that bill from this Committee's jurisdiction.

The plain fact of the matter is that the Committee on the Administrative Procedure Act has no work to do which is not already being done by another smaller, more efficient committee. I see no profit in leading 100 sheep into pastures already grazed over by countless others.

It seems to me that the only *raison d'etre* for a Committee of this size, and geographical and professional distribution is to act as a Supreme Senate to the Section Council. It could provide the Council with a cross-section of membership thinking on important issues. But, it is precluded by members and geography from making quick decisions on controversial matters. I am not at all convinced that the Section, or its Council, would welcome a Supreme Senate. Failing this, it is my personal opinion that the Committee on the Administrative Procedure Act should be discharged and its functions terminated.[3]

Respectfully submitted,
LEO A. HUARD, *Chairman*

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[3] See footnote 1. This is the Chairman's Report.

REPORT OF THE COMMITTEE ON AGENCY RULE MAKING

Identification of key problems in the rule making area, through continued analysis of agency responses to the Dawson Committee questionnaire and the study of current pertinent agency practices, has provided the focus for the work of the Committee on Agency Rule Making this year.

Examination of agency answers to the Dawson questionnaire's rule making section shows a multiplicity of agency conceptions of the definition, nature and function of rule making. With neither uniform nor consistent conceptions of this basic quasi-legislative power the agencies possess, it is not surprising that the nature and scope of rule making remain complex and confusing issues for judges as well as agency personnel and private practitioners. Despite the complexity and confusion, however, a pair of decisions which will be discussed at a later point, *Elof Hansson Inc.* v. *U.S.* and *N.L.R.B.* v. *E & B Brewing Co.,* appear to raise questions which may clarify, even if they cannot resolve, some of the basic problems that befog our conceptions of rule making.

In the realm of misconceptions, your committee found one that recurred in a majority of conversations with agency personnel at various echelons and with professors of public administration and administrative law: they assumed and often proclaimed that the ABA's Administrative Law Section was dedicated to the destruction of the administrative process through the "judicialization" of every phase of agency activity.

A prototype of this view was the statement by Professor Ferrel Heady in the *Public Administration Review* that "the basic objective" of the current reform campaign of organized lawyers "is well defined and widely acknowledged. In a word the goal is further 'judicialization' of the administrative process." [1] He cited the recent American Bar Association proposals for reform to support his point. Professor Heady's article tended to confuse what was termed "the goal" for the entire administrative process with what is in reality "a means" for achieving fairness and responsibility in the exercise of adjudicatory functions. The goal for lawyers, as well as for administrators, is not "judicialization" of the entire

[1] Heady, Ferrel, "The New Reform Movement in Regulatory Administration," *Public Administration Review,* Spring 1959, pp. 89-100.

administrative process; it is the creation, channeling and control of governmental powers so that they may be wielded in the public interest. In achieving this goal we must stress that there need be no inconsistency between creative administration and responsible administration, no contradiction between efficacy of administrative action and formulation and execution of that action pursuant to traditional standards of due process and fair play.

So far as rule making is concerned it should be made clear that, far from seeking to destroy or limit its exercise, the Section seeks to enable rule making to become a more effective, reliable and widely used instrument than it now is for the prescription, interpretation or implementation of legislative policy.

The following propositions should be considered, for example:

Norms of general applicability should be developed by administrative agencies primarily through resort to the rule making process so that the persons who will be affected by such norms can know the source and content of their rights and duties.

When broadly applicable rules are formulated or abruptly changed through agency adjudications, through agency press releases or through speeches by agency officials, rather than through utilization of the agencies' regular rule making processes, uncertainty and unequal application of the law may well ensue.

Greater resort to rule making pursuant to APA standards could materially reduce the number of cases to be adjudicated, since clear-cut, widely disseminated rules would obviate the necessity for litigation in many instances.

If the legal profession could reach a consensus on the validity of propositions like these, we could help develop the rationale and practical support for implementation by the agencies. Unfortunately, improvements in the administrative process do not appear likely to come quickly by way of Congress or the courts. As Justice Frankfurter has pointed out, among others, the "enormous increase" in the incidence of administrative law, which is "a response to the compelling need of society and penetrates the whole gamut of human affairs," has resulted in "building up, largely in empiric fashion, *a body of law not formulated by legislatures and of adjudications not made by courts and, to no small extent, not subject to their oversight.*" (Forward to *Trial by Agency,* p. xx)

One might well wonder on what grounds a Supreme Court justice asserts that the decisions of administrative agencies are not subject to a great extent to the oversight of the courts. Of course,

the Courts determined initially the contours of administrative discretion through judicial interpretations of concepts like due process of law, separation of powers, judicial review, substantial evidence and primary jurisdiction. It is obviously important to recognize that the outer limits of administrative policy making were judicially molded in landmark cases like *Crowell* v. *Benson* (185 U.S. 22), the *Morgan* cases (298 U.S. 468, 304 U.S. 1), *Schechter Poultry* (295 U.S. 495), *Panama Refining* (293 U.S. 388) and others.

It is equally important, perhaps more important, to recognize however that today the Courts do not exercise the principal planning or controlling power over the regulatory process. The bulk of the Supreme Court's decisions in which action by an agency is challenged nowadays accord full recognition to the agency's expertise, superior knowledge or experience and the right to take appropriate discretionary action (e.g. *Panama Canal Co.* v. *Grace Line,* 356 U.S. 309; *Moog Industries* v. *FTC,* 355 U.S. 44; *American Trucking Assns.* v. *Frisco Transportation Co.,* 358 U.S. 133; *Flemming* v. *Florida Citrus Exchange,* 358 U.S. 153; *FHA* v. *The Darlington,* 358 U.S. 84; *Schilling* v. *Rogers,* 28 Law Week 4495; *FTC* v. *Henry Brock & Co.,* 28 Law Week 4383; *FTC* v. *Anheuser-Busch,* 28 Law Week 454).

Given the current reluctance of judges to interfere with the exercise and administrative power, decisions like the *Hansson* and *E & B Brewing* cases call for careful examination.

The Hansson Case

On the basis of the Treasury Department's response to the rulemaking section of the Dawson Committee questionnaire, one would not ordinarily have anticipated the Department's claim in litigation that the Secretary is not an administrative agency and that proceedings leading to a finding of dumping under the Antidumping Act of 1921 do not constitute rulemaking. The Treasury's response to question 3 appears to be a well-reasoned and inclusive statement of the agency's conception of and practices in rulemaking. The description of rulemaking procedures appears almost a model of fairness and thoroughness:

> In general, the officer responsible for a particular activity will assign to a subordinate the task of drafting any needed rule, including any amendment or revision. The subordinate designated is typically the best qualified person, or working group, readily avail-

able to perform the task. All relevant data, including the suggestions which are continually received from members of the public, are collated and analyzed. A draft is then made and it is submitted for criticism and advice to the several officers and offices of the Department that are charged with responsibility for the subject matter. After the comment is received and considered, and any desirable modifications are made in the draft, it is then published as a notice of proposed rulemaking in the Federal Register, unless publication of notice is not legally requisite and is not desirable, either as a matter of public or private interest. Publication of proposed rulemaking invites recommendations from members of the public and frequently requests for a hearing. If a hearing is held, all interested persons are afforded opportunity to appear and elaborate their views in oral presentation. The hearing is a legislative-type hearing rather than a judicial-type hearing. The information developed as a result of publication of the notice and the hearing, if any, is appraised, the proposed rule is redrafted if developments are deemed to warrant redrafting, and the rule is promulgated.

In proceedings under the Antidumping Act, however, the Acting Secretary promulgated rules without publication of notice in the Federal Register prior to his findings of dumping and without any finding or statement that notice and public participation were impracticable, unnecessary or contrary to the public interest. When the validity of the Secretary's actions was challenged, it was asserted in his behalf that the Administrative Procedure Act was not applicable to the making of findings under the Antidumping Act, since the Secretary was "an agent of Congress" under the Act. Why this claim was made is not at all clear, and, as noted above, there was no discussion of such a claim in the agency's response to the questionnaire.

In November 1959, the Third Division of the Appellate Term of the U.S. Customs Court summarily rejected the Treasury's assertions and ruled that the Secretary of the Treasury is an administrative agency under the Administrative Procedure Act, that the Secretary's proceedings leading to a finding of dumping constitute rulemaking, and that the Secretary's failure to publish a notice of proposed rulemaking prior to making a finding of dumping made such finding invalid. To the claim that a government official is not an administrative agency, and hence not subject to the Administrative Procedure Act when functioning as an agent of Congress, the Customs Court replied, "All administrative agencies are

in a sense agents of Congress, since, through the rulemaking function, they legislate on the administrative level within the confines of the granting statute."

Since this matter first arose in March 1953, it is regrettable that the desirability of candor and precision did not prompt the Treasury to discuss its position in full in the response to the 1956 questionnaire. What is more puzzling, though, is why an agency official, as a self-styled "agent of Congress" would claim powers to legislate in secret that Congress itself has never asserted.

The E & B Brewing Case

This committee's studies last year under Raoul Berger's distinguished chairmanship, pointed out some anomalies between the contentions and practices of the NLRB in the realm of rule making. The agency's response to the Dawson Committee questionnaire denied that it engaged in rule making in the course of its unfair labor practice proceedings. The agency contended:

> It has generally been assumed that the Board's unfair labor practice proceedings are "adjudications" as defined by the Administrative Procedure Act rather than "rulemaking." The Attorney General so concluded in his interpretative manual (Attorney General's Manual on the Administrative Procedure Act (1947), p. 15). Indeed, so far as we are aware, no serious contention to the contrary has ever been made.
>
> The validity of this analysis is not impaired by the fact that principles established in the board's adjudicatory process may thereafter have broad application to parties other than those directly involved in the particular proceeding before the Board. That effect is merely a concomitant of the familiar principle of stare decisis and does not give an adjudication the character of a rule. . . .
>
> For the foregoing reasons, the Board has uniformly regarded itself as essentially a quasi-judicial rather than a rulemaking agency. The Board, therefore, like the courts, has not made it a practice to issue broad invitations to representatives of labor, industry, or the public generally to submit their views regarding a proposed decision even though many of its decisions have an impact far beyond their impact on the parties immediately involved.

Professor Cornelius Peck's thorough analysis of the NLRB's practices showed at least four instances in which the Board had

engaged in rule making despite its protestations to the contrary. In the *E & B Brewing* case, 276 F.2d 594 (1960) the Sixth Circuit Court of Appeals, in setting aside an NLRB order, recognized that the agency engaged in rule making in the course of the adjudicatory proceeding. Judge Pope's opinion gives rise to some basic questions about the scope of an agency's power to make rules of broad applicability in adjudicatory proceedings.

The Board sought enforcement of its order of reinstatement with back pay for a brewery employee after finding that the brewery and the Union had been guilty of unfair labor practices. The Company was found to have violated Par. 8(a)(3) and the Union Par. 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act.

The employer claimed that he had been discharged under pressure from the Union because of his non-membership. The agency's Trial Examiner denied the employee's contention and found that the sole reason for the discharge was the Union's insistence "upon compliance by the Company with the hiring hall clause of its contract." Since the Trial Examiner found also that the hiring hall "was being run in a nondiscriminatory manner," he recommended that the complaint be dismissed.

After considering the entire record, the Board rejected the Trial Examiner's recommendation, although the Board specifically adopted his finding that the sole reason for the discharge was enforcement of the hiring hall clause. The Board concluded that the Company and the Union had violated the statute in the very maintenance of their hiring hall agreement without explicit provision for three "safeguards" prescribed by the Board in an opinion handed down after the Intermediate Report in the present case.

The Sixth Circuit Court of Appeals set aside the Board's order and cited several "infirmities" in the Board's decision.

The first infirmity was that the decision handed down after the Intermediate Report in this case was a decision held erroneous by the Ninth Circuit Court of Appeals in *NLRB* v. *Mountain Pacific Chapter,* 270 F.2d 425. The Ninth Circuit had ruled that a hiring hall agreement with or without the so-called "safeguards" was not per se illegal. The D. C. Circuit's contrary opinion about per se illegality in *Local 357* v. *NLRB,* 275 F.2d 646 was dismissed by the Sixth Circuit as an opinion of a "divided court," which "neither

states the facts nor discusses the law," and which "does not appeal to us."

The *E & B* case would not be of major concern to the rule making committee if the Sixth Circuit Court's opinion stopped with the "first infirmity." Judge Pope then proceeded, however, to discuss the appropriateness of the Board's formulation of a new rule through an adjudicatory proceeding. The Court concluded that the Board's rule was a new one because of the Board's statement in its brief that "The case at bar is the first case in which the Board has explicated to this Court its reasons for finding that an exclusive hiring agreement violates the Act even though it may not on its face give preference in employment to members."

At the outset of this phase of the opinion, Judge Pope recognized the agency's power to establish new rules. He pointed out that "what may be called new rules may stem from two sources or theories of power," the first pursuant to the rule making provisions of the APA and the second through administrative adjudication. He disclaimed "any suggestion that because, in past years, the Board has never held that an exclusive hiring hall agreement, on the face of it, has such a tendency [to encourage membership in a Union] it may not now through a proper adjudicatory process, rule that it does indeed have such a tendency." At the same time, he asserted that "perhaps the Board might have saved itself a lot of trouble" by utilizing the APA method of making a rule.

The key to the decision then became the Court's construction of "proper" adjudicatory process. It found a violation of Par. 5 of the APA in that timely notice had not been given in the complaint or in the Examiner's ruling that the validity of the hiring hall was in issue. Consequently, "we hold that the Board cannot establish its attempted rule by an adjudication of a matter not in issue before it. In the absence of the statutory notice of the 'matters of fact and law asserted' the Board lacked power to pass upon any such issue as that now tardily argued in its briefs."

The Court also concluded that "there appears no reason why the public interest demands that the new rule be imposed at once and now, as to this particular contract" and it held that the Board violated Par. 10(e) of the APA. Raising once again the issues of the *Chenery* case, the Court held that the test of arbitrary or capricious agency action is the relationship between the hardships caused by the practical operation of the Board's change of policy and the public ends to be accomplished by the change. "The ill effect of

the retroactive application of the new standard must be balanced against the necessities of the public." After deciding that the Board's change of rules "would work hardships upon respondents altogether out of proportion to the public ends to be accomplished," the Court observed once more that the Board "has ample ways of instituting new rules without working any such hardship on these particular respondents."

What the Court seems to suggest here, in its opinion of many dimensions, is that retroactive application of a rule of broad significance developed in an adjudicatory proceeding should not be allowed when the agency could have followed the rule making procedures of the APA, unless the agency can show that the public interest demands that the new rule be imposed "at once and now." The Court appears bothered, not only by the Board's failure to inform the brewery and the Union fully about the "matters of fact and law asserted" but also by the breadth of the impact of the Board's newly adjudicated rule. "The Board's doctrine would retroactively invalidate every union contract which contains an exclusive hiring hall provision. If the Board's order stands, it is doubtful if even the Board can say how many hundreds or thousands of employers and unions are, as of now, guilty of similar unfair labor practices."

At the very minimum, the Court's decision is an *invitation* to administrative agencies to use the APA's rule making procedures for the formulation of broadly applicable rules rather than to formulate or change such rules through the adjudicatory process. At a maximum, it may serve as an alert to agencies to be prepared for strict construction of their powers under Par. 5 and Par. 10 of the APA when they rely on the adjudicatory process to formulate broadly applicable and retroactive rules.

Taken together, the *Hansson* and *E & B* cases raise basic questions for further study and investigation: What are the identifiable characteristics of rule making? Under what circumstances is rule making through adjudication desirable? Inevitable? Why do agencies which fear and condemn "judicialization" of their functions often prefer in practice to engage in rule making through the "judicialized" process of adjudication rather than through the APA's rule making provisions? What steps can we take to encourage greater resort to rule making proceedings that can clarify agency policies and programs and offer the public reliable information about their rights and duties?

While the Committee does not suggest answers at this time, it does seem apparent that answers can best emerge from full study and discussion by representative segments of the legal profession: agencies, judges, teachers and the private bar. Hence we indorse once more the reestablishment of the President's Conference on Administrative Procedure as a permanent National Conference.

The Security and Exchange Commission's response to the Dawson Committee questionnaire suggests some of the inherent values of the Conference on Administrative Procedure insofar as rule making is concerned. The SEC said

> In 1953 the Commission through its Chairman (the Commissioner) J. Sinclair Armstrong participated in the President's Conference on Administrative Procedure on the Committee for Uniform Rules. The Commission's delegate was especially concerned with uniform rules as to summary administrative procedures and concluded that uniform rules were neither needed nor feasible in this area. However, the Commission's delegate participated in the discussion and promulgation of suggested uniform rules as to service of process, appeal from intermediate decisions, scope of depositions or interrogatories, nonevidential proof (judicial notice, stipulation, etc.), pre-hearing conference, and so forth.

The very existence of a continuing forum for the exchange of information and ideas on administrative procedure is bound, as the answer indicates, to have a beneficial effect. Although uniformity may not be achieved in all feasible respects, improved standards of rule making receive substantial support and implementation from an institution like the Conference on Administrative Procedure.

To take another example, the Interior Department reported to the Dawson Committee: "in revising the regulations relating to appeals to the Director of the Bureau of Land Management and from him to the Secretary, the Department was guided by the recommendations of the President's Conference on Administrative Procedure with respect to such matters as computation of time and pre-hearing conferences."

The Federal Trade Commission's answer supported with some enthusiasm "the extended use of such conferences." The Commission said:

> "To the extent consistent with specific statutory provisions prescribing procedure before the Commission, the Commission has attempted to follow the recommendations addressed to Federal Ad-

ministrative agencies by the President's Conference on Administrative Procedure. These recommendations include the formulation and adoption of uniform rules where possible. In addition, the Commission will continue to achieve further uniformity in procedural rules.

"Among the significant recommendations of the President's Conference adopted by the Commission was provision for pre-hearing conferences to simplify, clarify and dispose of many of the issues of pending cases to the end that full attention may be given to disputed issues. Experience has shown that the extended use of such conferences has been very helpful."

As Judge E. Barrett Prettyman, who served as chairman of the Conference, informed the Dawson Committee, "The Conference was really a human encyclopedia of administrative procedure." It was made up of representatives from all the executive departments and independent agencies and of judges, trial examiners, and private practitioners of administrative law. "It was very educational to the agencies. It was quite amazing to see how some fellow would come in from some agency and think he had a peculiar problem that never happened before in the history of the world. When he mentioned it he found there were maybe a dozen other agencies that had the same problem in slightly different form. They all learned that they are dealing procedurally with somewhat similar problems."

When the Report of the Conference, containing 35 recommendations that had been expertly drafted and thoroughly studied and discussed by the delegates, was sent to the President, the President replied: "The report of the Conference demonstrates that Federal administrative procedures should and can be steadily improved. . . . The work of the Conference has shown that an exchange of experience and views between Federal administrators and between them and members of the practicing bar and the judiciary produces useful results. I am confident that means will be devised for continuing such cooperative effort."

Despite the enthusiastic reception accorded to the Report, the final recommendation of the Conference—that there be a Permanent Conference on Administrative Procedure—has not been followed. No comparable means has yet been "devised for continuing such cooperative effort."

Since the Association's resolution calling for the establishment of a permanent National Conference is still in effect, we merely call

attention to the continuing need for the Conference as a means of resolving the complexities and confusions that continue to abound in the area of rule making.

VICTOR G. ROSENBLUM, *Chairman*

RECOMMENDATIONS OF VICE CHAIRMAN RUTH SMALLEY

Neither a Permanent National Conference on Administrative Procedures nor occasional nudges by the judiciary can be expected to do much to encourage agencies to fill the interstices in skeleton legislation by exercising delegated legislative rather than judicial power. The history of *Chenery* case citations makes this too clear. The second *Chenery* case was a nudge encouraging rule making. See 332 U.S. 194, at 201-202. Throughout the agency responses to the Dawson Committee Questionnaire, the *Chenery* case is uniformly cited or miss-cited to support an agency's election to proceed by *ad hoc* adjudication rather than by rule making. Occasionally, as in the *E & B Brewing* case, it is cited as establishing limitations upon retroactive application of standards established in such adjudications. It has not been cited as establishing or suggesting, as it does, standards for finding abuse of discretion in the persistent failure or refusal of agencies to promulgate as rules those "rules of decision" which have become hoary as "well established" precedents, sometimes followed with *stare decisis* faithfulness.

The ABA Proposed Code of Federal Administrative Procedure permits agencies to avoid codifying the laws they write, although the ABA Specialized Administrative Courts proposal would compel such legislation. I think it is the duty of this Committee at this time to make concrete suggestions which would "encourage greater resort to rule making proceedings that can clarify agency policies and programs." I would have the Committee recommend that the Section consider recommending Association action to secure a policy declaration by Congress that administrative agencies shall (1) as a fixed policy, prefer and encourage rule making to reduce to the minimum the necessity for case-by-case administrative adjudications; (2) shall codify all "well-established" and frequently cited agency precedent; (3) shall, as rapidly as possible, issue all rules specifically authorized or required by statute; and (4) shall promptly formulate, incorporate in and promulgate as a rule or statement of policy any and all general principles, not

otherwise published as rules or specified in statutes, enumerated in any specific case decision.

The above recommendation would be a more specific implementation of the general principle approved in 1956, namely:

"(c) Requiring that no agency rule, statement of policy or interpretation of statute intended to have general application or effect and required by a statute or rule to be published shall, in any particular case, be a basis for a sanction or a ground of decision unless previously so published; provided that this shall not preclude the formulation of ad hoc policies or interpretations arrived at as a result of particular proceedings if clearly within and relevant to the issues thereof." 81 ABA 373.

RUTH SMALLEY, *Vice Chairman*

REPORT OF THE COMMITTEE ON AGRICULTURE

This Committee is so large that the chairman has been unable to operate through meetings although one meeting was unsuccessfully attempted at Chicago immediately preceding the semi-annual meeting of the ABA, therefore, he had to rely principally on correspondence. By this means several suggestions have been developed. All but one of these are matters for administrative action by the USDA.

I. The suggestions for possible administrative action by the USDA are as follows:

1. Better forms to be furnished to the Agricultural Standardization and Conservation Committees. Example—Form CSS-815, denominated "Practices Approved and Application for Payment" with particular reference to provisions printed on the back without indication on the front.

2. More use of prehearing particularly with regard to milk proceedings.

Under the Agricultural Marketing Agreement Act of 1937, as amended, the United States Department of Agriculture conducts promulgation hearings leading to the issuance of milk orders. These are rule-making proceedings in which many persons frequently participate. The issues largely relate to economic and marketing problems. These proceedings are instituted by notices of proposals published in the Federal Register.

The Committee on Agriculture feels that a substantial improvement could be brought about in the conduct of these proceedings if greater use were made of prehearing conferences for the purpose of explaining proposed orders and amendments to interested persons. At such prehearing conferences, there could also be an informal exchange of information which would result in shorter hearing records and bring about other desirable improvements in these proceedings.

There could also be required at such conferences the submission of statistical data so as to give interested parties the chance to verify such data before the hearing.

3. There has been some discussion by correspondence within the Committee of possible improvement in regulatory and review procedures within the Department. In the latter instance, this is with regard to the structure and practical operation of the review proceedings.

Generally, as nearly as can be told by correspondence, there is great confidence in the quasi judicial proceedings as conducted by the Judicial Officer under the Regulations of the Department.

A small minority of the Committee, according to the correspondence, felt that a special Assistant Secretary should be appointed to supervise the procedures of the Department in administering the Regulations when holding regulatory quasi legislative rule-making hearings. The present Judicial Officer has his time entirely consumed in the quasi judicial review proceedings. In fact, many believe he is over burdened. Therefore, there is no help to be gained from him in this connection, although he would be ideally situated to perform this function as he has no connection with any Divisions of the Department, including the office of the General Counsel, and is answerable directly to the Secretary. Such a man could serve as a clearinghouse for complaints on procedures in regulatory matters which arise in so many ways that they cannot be covered in advance by the Regulations. A couple of such examples that have been reported are:

(a) The action of a hearing officer in effectuating an economic action by extending time to file briefs without consultation with the proponents who could have pointed out that the relief would be ineffectual if late.

(b) Repetitious cross-examination by representatives of many different concerns participating in the hearing all asking the same questions.

It is appreciated that these examples relate to hearing officers as to whom the Department's jurisdiction is somewhat cloudy under Section 11 of the Administrative Procedure Act and the way the actual handling of their appointment evolved. However, a proper supervisory officer might be able at least to discuss such matters with them. On the other hand, an Assistant General Counsel is assigned to the direction and supervision of marketing and regulatory laws and is fully appreciative of the importance of these procedural questions as a part of his present duties.

The Department presently has at the direction of the General Counsel initiated study by a competent committee to improve practices and procedures with respect to regulatory programs and made some recommendations which have been approved by the Office of Administrative Procedure in the Department of Justice and effectuated through amendments of procedures. Others are under study.

In some of the answers received to a tentative draft of this report, it seems that in such draft (and this may turn out also to be true as to the final report) there was a lack of understanding of what was meant by "regulatory functions." What was in the chairman's mind in using the word "regulatory" was the quasi legislative

rule-making functions that result in decisions on hearing records as distinguished from the judicatory functions in review proceedings as to application of rules to particular situations and disciplinary proceedings which also result in decisions. Since the word "decisions" is present in the discussion of all three of these activities, it may be that the confusion has arisen because some use the word "decision" only in connection with the second and third types of activities.

It may be added as a footnote that soon after the present administration of the Department took over, a committee was appointed to review the entire field of milk marketing orders and this Committee found the procedures to be satisfactory. The chairman of the present ABA Committee was chairman of the Subcommittee on Administration and Procedure of the Federal Order Committee and in the comprehensive studies conducted by such Subcommittee on these matters, it was often found that the complainants as to procedures had not fully exhausted their ability to explore such matters with the proper officials of the Department, such as the Assistant General Counsel above mentioned.

II. On current legislation the Committee reports as follows:

1. With regard to the Carroll bill, S. 2374, relating to communications with administrative officials, the Committee, particularly its members specializing in producer milk price order regulatory proceedings under the Agricultural Marketing Agreement Act of 1937, as amended, feels that the present language of the bill would prevent essential communications between the industry and such officials. Such discussions are needed leading up to the initiation of such orders and their frequent amendment thereafter. The present Regulations of the USDA prevent communication, except on procedure, after the close of records of hearing required by the Act and on which such orders and their amendment must be based. This rule is proper to prevent ex parte influence and to prevent interruptions of the work on the decision. However, communications leading up to hearings are considered essential. (This important function of the USDA regulates the minimum prices to producers for milk in about 80 of the principal urban centers of the country and amounting to over $6,000,000 a day.) At the direction of the Section, views on this matter have been communicated to Professor Cornelius J. Peck, Chairman of the Committee on Code of Agency-Tribunal Standards of Conduct, who advises that he is working on a redraft of the bill.

NOTE: On the new Administrative Code as proposed in Congress by the ABA, many members of the Committee have communicated

with the chairman even though recognizing that the bill is now beyond the jurisdiction of the Committee and Section. These members, again particularly those engaged in milk market order work, believe that while the Committee and the Section were very helpful in working out changes that took care of many of their criticisms, they as individuals will still feel it necessary to bring to the attention of congressional committees some remaining difficulties that the ABA bill will create.

FRANK B. LENT, *Chairman*

(Jesse E. Baskette does not agree with parts of Section I, Subdivision 3.)

REPORT OF THE COMMITTEE ON AVIATION LAW

(1) *Proposed formation of a Civil Aeronautics Board Practitioners' Association.* On April 20, 1960 there was submitted a copy of a formal report prepared by Mr. Theodore I. Seamon of Washington, D. C. as a subcommittee of one, relative to the proposed formation of a Civil Aeronautics Board Practitioners' Association. Each member of the Aviation Law Committee was requested to indicate his approval or disapproval of Mr. Seamon's report; the ballots on this report were requested to be returned on or before May 1, 1960, although ballots received at a later date have been counted.

Sixteen ballots were returned; twelve members voted in favor of Mr. Seamon's report and recommendations and four members voted against such report and recommendations. (Franklin M. Stone, General Counsel of the Civil Aeronautics Board and Vice-Chairman of the Aviation Law Committee, abstained, as a result of his official position, from any participation in such vote.) In view of the foregoing vote, Mr. Seamon's report and recommendations are hereby declared to be the report and recommendations of the Aviation Law Committee with respect thereto; such report and recommendations are herewith being submitted to the Council of the Administrative Law Section for approval, with a request that, upon approval by such Council, such report and recommendations be submitted in turn to the House of Delegates and/or the Board of Governors for final action.

(2) *Ex parte representations to administrative agencies, including the question of congressional appearances before administrative agencies.* On April 28, 1960 there was submitted a copy of the formal report prepared by a three-man subcommittee consisting of Mr. Coates Lear as chairman and Messrs. Theodore I. Seamon and Jerrold Scoutt, Jr., regarding the above-captioned subject. Each member of the Aviation Law Committee was requested to indicate his approval or disapproval of the subcommittee's report on an attached ballot; the ballots on this report were requested to be returned on or before May 10, 1960 although ballots received at a later date have been counted.

Seventeen ballots were returned; fifteen members voted in favor of the subcommittee's report and recommendations, one member

voted against said report and recommendations and one member was undecided. (Franklin M. Stone, General Counsel of the Civil Aeronautics Board and Vice-Chairman of the Aviation Law Committee, abstained, as a result of his official position, from any participation in such vote.)

In view of the foregoing vote, the report and recommendations of said subcommittee are hereby declared to be the report and recommendations of the Aviation Law Committee with respect thereto; such report and recommendations are herewith being submitted to the Council of the Administrative Law Section for approval, with a request that, upon approval by such Council, such report and recommendations be submitted in turn to the House of Delegates and/or the Board of Governors for final action.

RICHARD H. KEATINGE, *Chairman*

APPENDIX TO REPORT OF THE COMMITTEE ON AVIATION LAW

A: REPORT TO THE COMMITTEE CHAIRMAN ON PROPOSED FORMATION OF A CAB PRACTITIONERS ASSOCIATION

At the time of my original report in 1955, the then Chairman of the Board favored the formation of a practitioners association. My more recent discussions confirmed the desirability of such an association. More recent emphasis upon problems of reorganization, procedural reform, so-called "ethical" standards (being considered both as proposed legislation and by regulation) and problems of similar nature have underscored the need for and function of an association of practitioners appearing before the Civil Aeronautics Board. It is clear that such an organization is necessary and desirable to act, if only on an *ad hoc* basis, on matters of concern to practitioners as a group. It is my further conclusion that while there is a continuing place for the committee, of which you are presently chairman, and for the Aviation Subcommittee of the D. C. Bar Association, neither of these committees can serve as an adequate and effective substitute for a CAB practitioners association.

The formation of such an association will require some volume of organization effort and work. Past experience has indicated that unorganized initiative by a few individuals cannot be relied upon

to spark the initial effort and on an informal basis to bring such an association to fruition.

A suggestion has been made that the formation of an association should be accompanied by or related to a regulated CAB bar with formalized provisions for admittance thereto by the Board, as in the case of the ICC. This would, of course, require Board action. A formalized CAB bar is not an essential preliminary to the formation of a practitioners association. The suggestion, however, does bring into focus the possibility that action to organize such an association could and should be accomplished under the aegis of, or, at least, with informal participation by the Board itself, or some office thereof, such as the General Counsel.

Recommendations:

(a) The Aviation Law Committee, Administrative Law Section, should go on record as favoring the formation of a CAB practitioners association.

(b) Initial action to organize same should be instituted by the Aviation Law Committee.

(c) The Aviation Law Committee should invite the CAB to submit its views and in connection therewith to solicit its formal or informal cooperation in the formation of such an association. [This latter recommendation is pertinent for a number of reasons, including the obvious interest of the Board and the further fact that a corollary to the formation of a practitioners association might be a formalized CAB bar with admittance to practice provided under and in accordance with rules promulgated by the CAB, similar to the ICC bar. Precedent for cooperation by the CAB itself is found in the fact that the ICC Practitioners Association was originally organized at the request of the ICC itself.]

Very truly yours,

THEODORE I. SEAMON

B: REPORT TO THE COMMITTEE CHAIRMAN ON EX PARTE REPRESENTATIONS

The Subcommittee of the Aviation Law Committee which you designated to make a report on this matter takes the position that H.R. 4800 and similar legislation should exclude appearances by members of Congress in adjudicatory proceedings before the administrative agencies except in cases where (a) the Congressman appears as attorney of record for an applicant in the same manner

as any other attorney or (b) where the Congressman appears as a witness in the evidentiary hearing before the Examiner in the same capacity as any other witness.

Your committee bases the above recommendations upon the following principal factors:

1. Decisions of administrative agencies in adjudicatory proceedings should be based upon the record in the case and nothing else. The practice in some administrative agencies of allowing members of Congress to appear at oral argument before the agency and make off-the-record statements obviously undermines the judicial functions of the agencies involved.

2. It is not really very important whether the administrative agencies are actually influenced by such congressional appearances. The important point is that proceedings before administrative agencies must give the appearance of affording justice to the parties involved. As the Supreme Court has observed "in every case justice must satisfy the appearance of justice." *In re Murchison,* 349 U.S. 133, 136 (1955). In other words, by failing to give the parties the impression of affording a fair hearing, the dignity and respect of the administrative agencies is seriously undermined regardless of whether the parties are actually afforded a fair hearing or not. The appearance of a fair hearing is even more important before the administrative agencies than before the courts for the reason that the former lack the contempt powers of the courts.

Wholly apart from the question of congressional influence, administrative agencies are today subjected in adjudicatory proceedings to letter-writing campaigns, appeals from various civic organizations and similar activities designed to influence the opinions of the agencies. Such campaigns should be largely eliminated by the passage of H.R. 4800 (or similar legislation), but in the meantime, your committee recommends that the agencies themselves revise their procedural regulations so as to provide that any efforts to influence the judgment of the regulatory agencies in adjudicatory proceedings, by letter-writing campaigns, etc., would be grounds for immediate and summary denial of the relief sought by the offending party. In other words, when the administrative agency is subjected to letter-writing campaigns or similar activities, it should be in a position to issue a Show Cause Order to the party thought to be responsible for the campaign and place the burden

upon the offending party of proving, if he can, that he is not responsible for the solicitation of such influence. If the offending party were unable to prove to the satisfaction of the administrative agency that he is not responsible for the influence campaign, then his request for relief should be summarily denied.

Very truly yours,
COATES LEAR

REPORT OF THE COMMITTEE ON CODE OF AGENCY-TRIBUNAL STANDARDS OF CONDUCT

The work of this Committee during the current year has consisted almost exclusively of redrafting the proposed Agency Hearing Standards of Conduct Act which was originally approved by the House of Delegates at the 1959 Midyear meeting. (See 11 Ad. Law Bull. 361.) Subsequently a revised version of the bill was prepared by Donald Beelar, Chairman of the Special Committee on the Federal Administrative Practice Act, who has urged its adoption in hearings before committees of both Houses of Congress. (See 11 Ad. Law Bull. 62.) The proposed legislation is now pending before the subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary and the House Committee on Interstate and Foreign Commerce in the form of bills numbered S. 2374 and H.R. 10657. A copy of the committee's redraft is attached hereto, with its proposed additions italicized and its proposed deletions set off in brackets.

Most of the deletions and most of the additions are self-explanatory technical changes made to meet objections and criticisms revealed thus far in hearings on the proposed legislation. The making of such changes is entirely in accord with the approving resolution of the House of Delegates, which urged the adoption of the then approved draft ". . . or its equivalent in purpose and effect . . ." However, some of the proposed changes are of sufficient significance to merit special comment.

A new section 2 has been added to the bill, incorporating the definitions of the Administrative Procedure Act and containing a definition of ex parte communications. The definition of ex parte communications contains a proviso concerning communications between agency members and hearing officers and other agency employees which is somewhat more liberal than the provision governing the separation of functions found in Section 1005(c) of the ABA's proposed New Code of Administrative Procedure (S. 1070) in that it exempts from the prohibitions of the Act communications between hearing officers or persons employed by the agency to assist in the preparation of decisions and other agency employees who are not engaged in the performance of investiga-

tive or prosecuting functions for any agency in that or a factually related case.

The last sentence of new section 3(c) has been bracketed for deletion. This has been done to avoid the harsh consequences which might otherwise be visited upon parties to proceedings through administrative oversight even though no ex parte approaches were made during the proceeding.

One member of the committee objects to the addition in new sections 4, 5, and 6 of a prohibition of ex parte communications to persons employed by the agency to assist in the preparation of any recommended initial, tentative, or final decision. He suggests that in some small agencies this language might well include the entire staff, and that the proposed amendment is in conflict with the Resolution of the House of Delegates at the 1959 Midyear meeting.

Another member of the committee objects to the provision made in new section 5 which would allow an agency to dispense with giving all parties to a proceeding notice of an ex parte communication if it found that the giving of such notice would constitute an oppressive burden. He suggests this would open the door to evasion of the purposes of the Act.

The Chairman of the Agriculture Committee has voiced concern that the proposed legislation would interfere with desirable prehearing collaboration in the proceedings which lead to issuance of milk orders under the Agricultural Marketing Agreement Act. These orders, made in rule-making proceedings, must be based solely upon evidence introduced in the record at the hearing. The practice has been one of collaboration, consultation, and ex parte discussions prior to hearing, which, of course, would be prohibited by the proposed Code. While it might be desirable to preserve this system of regulation of the milk industry, it would seem better to accomplish this by deleting the requirement that orders be based solely upon record evidence from the Agricultural Marketing Agreement Act than by departing from the principle that there be no ex parte communications in proceedings which are by law required to be based upon a hearing record. Accordingly, the proposed draft contains no provisions dealing with the problem raised by the Agriculture Committee.

Subject to the doubts expressed by individual committee members, it is the committee's recommendation that the attached draft

be approved as the current ABA proposal for an Agency Hearing Standards of Conduct Act.

No other proposals for Committee activity have met with committee approval. Accordingly, the Chairman requested the members to state their views on abolition of the committee upon completion of the task of revising and polishing the existing draft. Upon the basis of incomplete responses to this inquiry, it appears that the committee does favor its abolition, with the understanding that lobbying activities in favor of the proposed legislation be carried on by the Special Committee on the Federal Administrative Practice Act. Conceivably, the committee might be kept active until hearings on the bill are completed and the legislation adopted, thus ensuring the availability of a group to make further improvements and corrections of errors or oversights revealed in hearings. This work, however, may just as well be assigned to the Special Committee on the Federal Administrative Practice Act, with a saving of manpower and committee organization.

CORNELIUS J. PECK, *Chairman*

Subsequent to the preparation of this report, the House Committee on Interstate and Foreign Commerce reported on H.R. 12731, relating to the C.A.B., the F.C.C., the F.P.C., the F.T.C., the I.C.C., and the S.E.C., and enacting measures to keep their operations free from improper influence, including ex parte communications. The House Committee recommended passage of H.R. 12731. The effect of the House Committee action has not been considered in this report.

May 25, 1960

A BILL

To establish standards of conduct for agency hearing proceedings of record.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SEC. 1. That this Act may be cited as the "Agency Hearing Standards of Conduct Act."

SEC. 2. (a) *Unless this Act otherwise indicates, the definitions of Section 2 of the Administrative Procedure Act, 5 U.S.C. 1001 shall be applicable to the terms of this Act.*

(b) *An ex parte interview, argument, or communication includes any interview, argument, or communication concerning the merits or*

the procedure in a proceeding made by any person, whether or not that person be a party to the proceeding, provided however, that interviews, arguments, and communications between agency members, hearing officers, or persons employed by the agency to assist in the preparation of decisions and other agency employees who are not engaged in the performance of investigative or prosecuting functions for any agency in that or a factually related case shall not constitute ex parte interviews, arguments, or communications for the purpose of this Act.

Sec. 3. Hearings of Record.—(a) In agency hearing proceedings which by law are subject to notice and opportunity for hearing, the agency's consideration and decision shall be based solely and exclusively upon the matters of record including the notice of hearing, pleadings, evidence and contentions in the proceedings *and such matter which has properly been made subject to judicial or official notice.* Such proceedings shall include (1) adjudications, and (2) hearings which by law are made subject to the procedure governing adjudications. Additionally other proceedings shall be subject to the standards of conduct of this Act in each case where *for reasons found and stated* it is so specified in the agency's notice of hearing as provided in section 3(c) of this Act. Rule making proceedings which in the agency's judgment are adversary in character to *such* a substantial degree *that ex parte communications may afford unfair advantage to interested persons* shall be made subject to the provisions of this Act.

(b) The requirements of section 3(a) shall not apply to (1) agency actions which are administrative or executive in character; (2) administrative rulings or interpretations not subject to notice and hearing; (3) investigations; and (4) rule-making proceedings other than those which by the agency's notice of hearing are made subject to section 3(a) above.

(c) The notice of hearing in each agency proceeding shall state whether the proceeding is or is not subject to section 3(a) of this Act. [A notice of hearing which fails to comply with this section 3(c) shall be void.]

Sec. 4. Ex parte Influence, Responsibilities of Agency Members and Hearing Officers.—After a proceeding subject to section 3(a) of this Act has been noticed for hearing it shall be unlawful for any agency member or hearing officer who presides over or participates in the decision or conduct of such a proceeding *or any person employed by the agency to assist in the preparation of any recommended initial, tentative or final decision* to permit, entertain or consider any ex parte interview, argument, or communication pertaining to his consideration or decision of such proceeding, except (*a*) in circumstances authorized by law, or [to receive any communication without promptly disclosing the same] (*b*) *if disclosure of the communication is made* as required by section 5 of this Act.

SEC. 5. Disclosure.—(a) After a proceeding subject to section 3(a) of this Act has been noticed for hearing, if any such interview, argument, or communication contrary to section 4 is received by an agency member, [or] hearing officer *or person employed to assist in the preparation of decisions* he shall promptly make the communication, if written, or a [true] summary *to the best of his recollection* if oral, together with a statement of the circumstances available by placing the same in the public file of the agency with notice thereof to all parties, *provided however, that if the agency finds that because the number of parties make the giving of individual notice to each party an oppressive burden and makes that finding a part of record, individual notice to the parties need not be given.* No such ex parte communication or information shall be considered in the proceeding *nor shall it be necessary for the agency to receive any evidence in explanation or rebuttal of the communication or information* unless the same shall have been duly admitted in evidence.

(b) Failure to make the disclosures required in section 5(a) above may be cause for disqualification, censure, suspension, or removal from office.

(c) A willful violation of this section shall be subject to a fine of not more than $10,000 or imprisonment for not more than one year, or both.

SEC. 6. Ex Parte Influence, Responsibilities of Litigants and Others.—(a) It shall be unlawful after a proceeding subject to section 3(a) of this Act has been noticed for hearing for any person, with intent to influence the consideration or decision of a proceeding, to communicate ex parte, directly or indirectly, with any agency member, [or] hearing officer *or person employed to assist in the preparation of decisions* concerning a proceeding which is pending before the agency, except in circumstances authorized by law or upon reasonable notice to all parties of record.

(b) A willful violation of section 6(a) shall be subject to a fine of not more than $10,000 or imprisonment of not more than one year, or both.

(c) Violation of section 6(a) by any party to the proceeding or by anyone acting for or in his behalf, shall be good cause, in the agency's discretion, for disqualification of such party in that proceeding, *or for revocation of any existing license previously granted by the agency to that party.*

DISSENT

Joseph W. Kaufman, a member of the Administrative Law Section's Committee on Code of Agency-Tribunal Standards of Conduct believes that the proposed bill should not provide for criminal penalties ap-

plicable to agency members or hearing officers, semi-judicial officers as they are, for whom the disciplinary penalties provided for are alone appropriate. He also believes that it should not provide for "disqualification" of a party who commits a violation, since such a penalty smacks of forfeiture, particularly as applied to such quasi-property rights as Social Security and Veterans' benefits, and here is unusually onerous since it may follow from a violation not committed by the party himself but "by anyone acting for and in his behalf."

REPORT OF THE COMMITTEE ON COMMUNICATIONS

I

Resolution presented for approval:

"*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'WHEREAS, H.R. 8426, 86th Congress, 1st Session, would create (1) a Frequency Allocation Board responsible for the division of the radio frequency spectrum and use coordination between bands of frequencies available for assignment to Federal Government users and non-Federal Government users, and (2) a Government Frequency Administrator responsible for the assignment of frequencies available to Federal Government users, under the direction of the President; and

'WHEREAS, By the undefined and undifferentiating use of the term "allocate," H.R. 8426 fails to define the authority of the Frequency Allocation Board *vis-a-vis* the FCC and the Government Frequency Administrator; and

'WHEREAS, The non-applicability of the Administrative Procedure Act and the lack of alternative procedural safeguards, coupled with the lack of any standards or policy guidance concerning proper allocation of the spectrum, raise questions of the constitutionality of the delegation of such unlimited power to regulate this aspect of interstate and foreign commerce; and

'WHEREAS, Quite aside from any constitutional question, the total inapplicability of the Administrative Procedure Act disregards the cumulative experience of the Congress and of the bar that procedural safeguards should only sparingly be dispensed with and, then, only by particularized exemption specifically justified in each case; and

'WHEREAS, The apparent authorization to appropriate for Federal Government use frequencies already licensed by the FCC to private users during the term of the license, without prior notice, without hearing, and without judicial review, raises a serious question under the due process clause; and

'WHEREAS, H.R. 8426 fails to distinguish between regulatory procedures appropriate in emergencies and those appropriate in the regular course of things;

'*Be It Resolved,* That this Association authorizes and directs the Section of Administrative Law by all necessary and appropriate

means, including appearance before Committees of Congress, to oppose H.R. 8426 or similar legislation which may be introduced in subsequent Congresses.' "

II

The Committee on Communications received unanimous reports from two subcommittees created to consider (1) H.R. 8426, 86th Congress, 1st Session, a bill cited as the "Radio Frequency Allocation Act" and (2) the treatment of counterproposals in rule making proceedings. The chairmen of these subcommittees were Ernest W. Jennes and John H. Midlen, respectively. Their reports were circulated by mail to all of the members of the Committee on Communications and received the approval of the committee, two members (Paul Dobin and George S. Smith) disagreeing, however, with the report on H.R. 8426.

Report on H.R. 8426, "Radio Frequency Allocation Act"

III

Scope of Report

H.R. 8426 involves (a) broad questions of public policy concerning utilization of the radio frequency spectrum and the organization machinery by which this is to be managed, and (b) questions of administrative law and procedure presented by this particular bill.

This Report does not deal with the broad questions of spectrum utilization and the proper machinery for obtaining effective use of radio frequencies since they present matters of general policy and political judgment which are not within the province of this Association. The Report deals solely with the questions of administrative law and procedure created by H.R. 8426, thus focusing upon matters with which associations of lawyers have long been concerned and in which this committee has a vital and proper interest.

Under the circumstances, the final recommendation of this Report—opposing passage of H.R. 8426 because of specific deficiencies of the bill—should not be taken as meaning that, if these deficiencies were corrected, this Committee either would or would not support its passage, since this would involve questions outside of the scope of this Report.

IV

Background

Utilization of the radio frequency spectrum involves (a) "division" of the spectrum by reserving frequencies for exclusive and non-exclusive assignment to Federal Government users, on the one hand, and non-Federal Government users, on the other, (b) "allocation" of general bands or frequencies for certain uses and (c) "assignment" of specific frequencies to particular users. Under the Communications Act of 1934, as amended (47 U.S.C. § 151 et seq.), the power to allocate bands of frequencies for non-Federal Government use and the power to "assign" frequencies to all radio frequency users, except Federal Government users, are given to the Federal Communications Commission, while the power to allocate bands of frequencies for Federal Government use and to "assign" frequencies to *particular* Federal Government users is given to the President. The present law does not establish any general division of the radio frequency spectrum as between bands of frequencies available for assignment by the President to Federal Government users and bands available for assignment by the FCC to non-Federal Government users. This general division of spectrum space is accomplished through agreement between the FCC and representatives of the President. Likewise, coordination of uses by Federal Government users and non-Federal Government users, respectively, is achieved by agreement between the FCC and representatives of the President. Existing law does not provide for a single "final arbiter" except during a war emergency.

V

Purposes of H.R. 8426

H.R. 8426 is intended to accomplish the following basic purposes:

(1) To establish a single authority responsible for definitive division of spectrum space and use coordination as between bands of frequencies available for assignment to Federal Government users and bands available for assignment to non-Federal Government users.

(2) To establish a single authority, comparable to the FCC, responsible for utilization of spectrum space available to Federal Government users.

VI

Brief Analysis of H.R. 8426

H.R. 8426 would create (A) a Frequency Allocation Board (FAB) responsible for division of the radio frequency spectrum and use coordination between bands of frequencies available for assignment to Federal Government users and non-Federal Government users, respectively, and (B) a Government Frequency Administrator (GFA) responsible for the assignment of frequencies available to Federal Government users, under the direction of the President.

The bill would not change the authority of the FCC to assign frequencies available to non-Federal Government users, but such assignments would be subject to change by action of the FAB.

A. Frequency Allocation Board

The FAB, an independent agency within the executive branch, is to be composed of three members, not more than two of whom are to be of the same political party, appointed by the President with the advice and consent of the Senate, for staggered terms of nine years, removable only for cause.

The functions of the FAB would be:

> (1) to conduct a continuing and comprehensive study of, and develop long-range plans for, the utilization of the radio frequency spectrum,
>
> (2) on its own initiative or on application of the FCC or the Government Frequency Administrator, "to allocate radio frequencies for Federal Government use and non-Federal Government use, as the Board deems appropriate, and to modify or cancel any such allocation,"
>
> (3) to advise the President in connection with radio spectrum matters affecting the foreign relations of the United States, and
>
> (4) to maintain for public inspection tables of radio frequency allocations for Federal Government use and non-Federal Government use.

The FAB, in making allocations, would be required to act by order, which orders are to be promptly transmitted to the President. If the President is of the opinion that the FAB's order involves a question of national security or foreign relations, he could suspend effectiveness of the Board's order for such period as he deems necessary to consider such questions. If he "deems it

necessary or appropriate" in the interest of national security or foreign relations, the President could (1) delay the effectiveness of the FAB's order, (2) set aside the order, or (3) "make or direct the making of such allocation of radio frequencies, or take or direct the taking of such other action as he deems necessary or appropriate."

Separately, in Section 206(b), the bill provides that, whenever "the President determines that there exists an emergency involving national security or foreign relations which requires allocation of a radio frequency for Federal Government or non-Federal Government use and that need for prompt action makes" impractical the normal procedures, he may "make the allocation deemed by him to be necessary."

The bill does not define "allocation," although it is probably to be read as using the term in more than one sense, nor does it define "national security" or "foreign relations"—all three of which terms are important in delimiting the proper exercise of powers conferred by the bill.

The bill would expressly preclude application of the Administrative Procedure Act to actions of the FAB or the President. Further, it provides that orders of the FAB and the President shall take effect at such time as the orders designate and "shall be published in such manner as the President or the Board . . . shall determine."

The bill would *not*

(1) establish any broad national policy to govern the FAB (and the President) in dividing the radio frequency spectrum between bands available for assignment to Federal Government users and non-Federal Government users, respectively, and in establishing proper coordination of uses,

(2) establish procedural standards with which the FAB and the President must comply before exercising their authority,

(3) require that opportunity for hearing or participation be given to interested parties either before or after action is taken,

(4) require any explanation or findings by the FAB or the President in support of actions taken,

(5) provide for judicial review of any actions of the FAB or the President, even though the bill apparently would authorize summary appropriation for Federal Government use of frequencies already licensed to non-Federal Government users, and makes doubtful effective review of other than constitutional questions by precluding application of the Administrative Procedure Act.

B. Government Frequency Administrator

The GFA is to be appointed by the President and "shall be responsible solely and directly to the President or such official as the President may designate and to no other authority in the executive branch."

"Subject to the authority, supervision, and control of the President, the Administrator—

> "(1) shall conduct on a continuing basis a thorough and comprehensive study and investigation of the allocation of radio frequencies among and utilization of radio frequencies by the departments and agencies of the Federal Government in the light of present and future needs of such departments and agencies; and
>
> "(2) shall allocate radio frequencies among and assign radio frequencies to the departments and agencies of the Federal Government pursuant to the authority granted by or under section 302; and may modify or cancel any such allocation or assignment."

Section 302 of the bill provides that the frequencies available for assignment to Federal Government users by or under the direction of the President are to be those frequencies allocated (either by the Frequency Allocation Board or by the President) for Federal Government uses.

The Government Frequency Administrator, in other words, is to perform functions to some extent now performed by the Office of the Director of Civil and Defense Mobilization (OCDM) and by the Interdepartmental Radio Advisory Committee (IRAC) (a group composed of representatives of various of the very Federal Government Departments to which are assigned radio frequencies) and to some extent not now delegated to any particular agency.

VII

Legal Questions Presented By H.R. 8426

Congress' power under the Constitution over the radio transmission of electrical energy is derived from its regulatory powers.* Thus, the standards properly to be applied to H.R. 8426 are those applicable when Congress performs its regulatory function and not those applicable when Congress disposes of property to

* Compare Communications Act of 1934, as amended, 47 U.S.C. § 151; Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933); National Broadcasting Co. v. United States, 319 U.S. 190, 193 (1943); Davis, Radio Law, at 37 (1929).

which the Federal Government has title. In other words, while the phrase "the airways belong to the people" may be a convenient verbalism, it provides no basis for evaluating H.R. 8426.

Several important legal questions are presented by this bill.

(1) The undefined and undifferentiating use of the term "allocate" creates confusion as to the exact authority of the FAB *vis-a-vis* the FCC and the GFA. The grant to the FAB in Section 204(a)(2) of the power to allocate frequencies could mean either (a) that the FAB could divide the radio frequency spectrum between bands available for assignment to Federal Government users and non-Federal Government users, respectively, but could *not* decide the uses to which various frequencies may be put, or (b) that the FAB would make such a division and, in addition, could prescribe the uses to which the frequencies assignable by the FCC and the GFA may be put.

The first and more limited interpretation could well have been intended in view of the language of Section 404(b) of the bill, which provides that "nothing in this Act shall affect the power of the Federal Communications Commission to allocate and assign radio frequencies to non-Federal Government users. . . ." However, it seems most unrealistic because FAB action would presumably have to take into account the use-needs of both groups and attempt to coordinate them. Whatever the intention may have been, therefore, the FAB's power to "allocate" broadly would necessarily carry with it, as a practical matter, the power to control the allocations functions of the FCC. Moreover, if the FAB simply made frequencies available to the FCC and the GFA without prescribing the uses to which general bands of frequencies could be put, coordination of uses would have to occur through agreement of the FCC and the GFA. This would be quite similar to the present system which the bill proposes to change (modified, of course, by the existence of the GFA with full authority over Federal Government uses).

The second interpretation is also more nearly consistent with the purpose of the act to achieve coordinated utilization of the spectrum and with the fact that the Board is directed to make a continuing study of uses. It is, however, inconsistent with section 404(b) of the bill. Further, under this interpretation the FAB (and the President) would have the ultimate and virtually unbounded power to determine the uses to which radio frequencies shall be put.

The lack of clarity with regard to the "allocation" function appears to be a serious defect in the bill.

(2) The non-applicability of the Administrative Procedure Act and the lack of any alternative procedural safeguards, coupled with the lack of any standards or policy guidance concerning proper allocation of the radio spectrum, raise questions as to the delegation to a three-man board and the President of such unlimited power to regulate this portion of interstate and foreign commerce. The bill would grant authority (a) to the FAB to make any allocation it deems appropriate and (b) to the President, if he thinks that there are questions involving foreign relations or national security, to make any order he deems appropriate, without any procedural safeguards against arbitrary action. While the Supreme Court has not struck down a delegation of power as unconstitutional since *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), the delegation of power under this bill would appear to be so unrestrained and unlimited as to present a serious question.

(3) Quite aside from any constitutional question, the bill's express disavowal of the procedural safeguards of the Administrative Procedure Act and the failure to provide alternative safeguards against arbitrary action, especially when coupled with the lack of provisions enunciating Congressional standards, raise serious questions of administrative law and policy.

The Congress, recognizing the general failure of regulatory agencies during the 1930's and early 1940's to give notice and to afford hearing and other procedural safeguards to persons affected by regulatory action, unanimously enacted the Administrative Procedure Act to apply across the board to all regulatory agencies. The Congress was so concerned about administrative disregard of procedural safeguards that it specifically prohibited the implied repeal of any provisions of the Administrative Procedure Act. Exemptions were to be granted sparingly and, moreover, were to be particularized so that procedural safeguards would be dispensed with only where such action is absolutely essential.

H.R. 8426, however, completely disregards the cumulative experience of the Congress and of the bar, since, without providing any alternative safeguards, it totally exempts all of the functions of the FAB, the GFA, and the President from all of the provisions of the Administrative Procedure Act, and it gives no reasons for doing so.

(4) The bill would appear to authorize, during the term of the license, the appropriation for Federal Government use of frequencies already licensed by the FCC to private users, without prior notice, without hearing, and without judicial review. This would raise a serious question under the due process clause. See *Federal Communications Commission* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943).

(5) Unlike the Communications Act of 1934, as amended (47 U.S.C. § 151 et seq.), and unlike the recent Federal Aviation Act (49 U.S.C. §§ 1301-1542), H.R. 8426 does not distinguish between regulatory procedures appropriate in emergencies and those appropriate in the regular course of things. It contemplates summary action by the FAB and the President in both situations. Indeed, even in the absence of a national security emergency, the President could make any order he deemed "appropriate," so long as the FAB order "involves a question or questions of national security or foreign relations." The only distinction—and that a small one—between emergency and non-emergency situations is the provision that in emergencies the President would not have to wait for an FAB order before taking whatever action he deemed necessary.

VIII

Conclusions

By the undefined and undifferentiating use of the term "allocate," H.R. 8426 fails to define the authority of the Frequency Allocation Board *vis-a-vis* the FCC and the Government Frequency Administrator.

The non-applicability of the Administrative Procedure Act and the lack of alternative procedural safeguards, coupled with the lack of any standards or policy guidance concerning proper allocation of the spectrum, raise questions of the constitutionality of the delegation of such unlimited power to regulate this aspect of interstate and foreign commerce.

Quite aside from any constitutional question, the total inapplicability of the Administrative Procedure Act disregards the cumulative experience of the Congress and of the bar that procedural safeguards should only sparingly be dispensed with and, then, only by particularized exemption specifically justified in each case.

The apparent authorization to appropriate for Federal Government use frequencies already licensed by the FCC to private users during the term of the license, without prior notice, without hearing, and without judicial review, raises a serious question under the due process clause.

Finally, H.R. 8426 fails to distinguish between regulatory procedures appropriate in emergencies and those appropriate in the regular course of things.

IX

Recommendation

In light of the foregoing analysis and the specific deficiencies of this bill in matters of administrative law and procedure, the committee recommends that H.R. 8426 be opposed.

REPORT ON COUNTERPROPOSALS IN RULE MAKING PROCEEDINGS

X

The Problem Presented

When the Federal Communications Commission issues a Notice of Proposed Rule Making it describes the substance of the proposed rules and invites from all interested persons comments (a) supporting or opposing proposals set out in the Notice or (b) containing any modifications or counterproposals the parties may wish to submit. The parties submitting such comment sometimes offer counterproposals beyond the ambit of the matter presented by the Notice of Proposed Rule Making, and it is the practice of the Commission to give consideration to such counterproposals in making a determination on the merits of the matter. Such counterproposals are not published in the Federal Register and there is no Commission requirement that they be served on other parties interested in the proceeding. The result is that at times parties not affected by the subject matter in the Notice of Proposed Rule Making may have no knowledge of the filing of the counterproposal which could vitally affect their interests.

An example of how this may arise was contained in the Evansville, Indiana rule making proceeding. The Commission issued a Notice of Proposed Rule Making (Docket No. 11757) contemplating UHF assignments only to Evansville, Indiana for commercial broadcast stations with Channel 7 at Evansville to be re-

served for non-commercial educational use. A UHF permittee at Louisville, Kentucky filed comments with a counterproposal that Channel 7 be reallocated to Louisville, Channel 9 to be reallocated or be deleted from Hatfield, Indiana, and that certain UHF channels be allocated to Evansville and Hatfield. UHF permittees in Evansville and Henderson, Kentucky filed joint comments urging, among other things, that VHF Channel 9 allocated to Hatfield, Indiana be reserved for educational use in the Hatfield-Owensboro area. No construction permit had been issued for operation on Channel 9 at Hatfield and the Notice of Proposed Rule Making did not mention Channel 9. Among other things, the Commission's Report and Order deleted Channel 9 from Hatfield and assigned it to Evansville for use as a non-commercial educational station.

XI

Notice Requirements of the Administrative Procedure Act and the Commission's Rules

A. *Administrative Procedure Act.* Section 4(a) of the Administrative Procedure Act, in pertinent part, provides that: "Sec. 4(a) Notice—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; * * * (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

B. *The Commission's Rules.* Sections 1.202 through 1.219 of the Commission's rules deal with rule making practice and procedure. The requirement for publication in the Federal Register and the contents of the notice in general follow the statutory provisions of Section 4(a) of the Administrative Procedure Act (Sections 1.211 and 1.212, FCC Rules). A further Notice of Proposed Rule Making will be issued with opportunity for comments in any rule making proceeding "where the Commission deems it warranted." (Section 1.216, FCC Rules.) There is nothing in the Commission's rules making mandatory a further Notice of Proposed Rule Making with publication in the Federal Register in connection with counterproposals of a major nature submitted in response to the original Notice of Proposed Rule Making.

XII

Applicable Court Decisions

In the Evansville-Owensboro case (*Owensboro On The Air, Inc., et al.,* v. *United States, et al.,* 18 RR 2001) the United States Court of Appeals for the District of Columbia Circuit (Circuit Judges Danaher and Bastian with Circuit Judge Fahy dissenting) upheld the Commission in deleting Channel 9 from Hatfield, Indiana on the basis that the original Notice of Proposed Rule Making gave adequate notice of the subjects and issues involved and the objecting party had opportunity to comment on the suggested deletion of Channel 9. The Court noted that such objecting party (a) had filed a motion to strike the comments without apparently arguing the merits on the basis that the Notice of Proposed Rule Making had failed to comply with the requirements of Section 4(a) of the Administrative Procedure Act, and (b) failed to file any Petition for Reconsideration.

In the case of *Logansport Broadcasting Corp.* v. *United States* (10 RR 2008), the United States Court of Appeals for the District of Columbia Circuit with respect to the requirements of Section 4(a) of the Administrative Procedure Act stated that this Section "requires only that the prior Notice include 'a description of the subjects and issues involved' " and that "every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again." (10 RR 2013).

XIII

Possible Remedial Procedures

In the absence of a different determination on the notice requirements by the Courts or a change of such notice requirements in the Administrative Procedure Act, neither of which appear to be early possibilities, the only immediate solution would seem to be a change of the Commission's rules or public notice practices concerning counterproposals in rule making proceedings. Possibilities in this respect studied were the following:

1. Amendment of the Federal Communications Commission's rules concerning service in rule making proceedings to require counterproposals, in order to be given consideration, to be served upon obviously interested parties together with service within a reasonable number of days such as five (excluding Saturdays,

Sundays, and Holidays) upon all parties who filed comments in the rule making proceeding conforming with the requirements for specifications of pleadings and number of copies (Sections 1.52 and 1.54, FCC Rules), thus obviating the necessity of serving those persons merely sending letters, telegrams and post cards in rule making proceedings.

2. Amendment of the Federal Communications Commission's rules to provide for a reasonable time for submission of counterproposals or substantial variances from the proposal contained in the Notice at a reasonably earlier date than the date for filing comments in support of or in opposition to the proposal as set forth, coupled with the issuance by the Commission of a press release concerning such counterproposals similar to those it issues concerning the filing of petitions for rule making.

3. Amendment of the Commission's rules to provide for Further Notices of Proposed Rule Making with publication in the Federal Register concerning counterproposals with reasonable opportunity for interested parties to file comments.

XIV

Recommendation

The committee has carefully considered the problems presented and recommends that no action be taken to effectuate changes in the Commission's rules. The requirement that counterproposals be published in the Federal Register in the form of Further Notices of Proposed Rule Making would unduly delay ultimate decisions in rule making proceedings and make possible almost endless rounds of filings in the nature of counterproposals. An "interested party" is difficult to define with sufficient exactitude to warrant the issuance of a rule requiring service on such persons. Rule making proceedings cover a broad scope of subjects and parties cannot possibly know in many instances all the persons who might be interested. The requirement that counterproposals be filed prior to the date for the submission of comments, with issuance of a Commission press release describing them, is not recommended. Counterproposals frequently give birth to other counterproposals which likewise should be filed before comments and described in press releases, with resulting delay and additional administrative processing.

It is believed that notice of counterproposals is obtained by interested parties in substantially all cases, and that the wide

variety of rule making proceedings makes unwise changes in the Commission's rules regarding counterproposals. Counsel should serve persons who are obviously interested; failure to do so invites the risk of court reversal if knowledge of a counterproposal, expressed or implied, is not obtained by a person having a definite interest in it.

PERCY H. RUSSELL, *Chairman*

COMMITTEE ON THE FEDERAL REGISTER

The Federal Register Committee submits the following final report to the Council, Section on Administrative Law, American Bar Association:

I. *Prior Activity and Report of the Committee.* The Committee filed an interim report with the Council of the Administrative Law Section at the midwinter meeting of the American Bar Association held in Chicago, Illinois in February 1960. This interim report summarized the activities of the Committee and in particular the results of a questionnaire which had been distributed in December 1959 to the members of the Administrative Law Section, relating to the Federal Register and the Code of Federal Regulations. A tabulation of the answers together with a summary of the comments received by the Committee was attached to the interim report. There was also attached as an appendix to the interim report a statement giving the statutory authorization, purpose and availability of the Federal Register and the Code of Federal Regulations. The interim report put forward no conclusions or recommendations. The interim report, however, stated that the Committee proposed "(1) to have further extensive conferences with interested persons, including the Director and staff members of the Federal Register and other government departments; (2) to encourage the preparation by a law librarian of a report on the use of loose-leaf services, and a bibliography of technical papers written in this field; (3) to circulate a further questionnaire to the members of the Section who responded to Question 9 of the initial questionnaire; and (4) to prepare a final report for the meeting of the Council scheduled for August, 1960."

II. *Additional Membership on the Committee.* Mr. David C. Eberhart, Director, Office of the Federal Register, was appointed by the Chairman of the Section on Administrative Law as a member of the Committee. Mr. Eberhart has participated actively in the deliberations of the Committee. His work has been of valuable assistance to the Committee.

III. *Activities of the Committee since the Interim Report.* The Committee and its Chairman have had a number of conferences with members of the Bar and with officials of Government agen-

cies concerning the Federal Register and the Code of Federal Regulations. These have not been as extensive as the Chairman of the Committee had hoped, since it has not been possible to interview the interested officials of each of the major Federal regulatory and administrative agencies.

The Committee has encouraged the preparation by Miss Amy Jennings, Librarian of the Federal Trade Commission, of a report on the use of the Federal Register and Code of Federal Regulations, and on loose-leaf publications from the point of view of a librarian dealing with such materials. This article together with its bibliography is attached to this report. The Committee commends the article to the study of the members of the Council and of the Section on Administrative Law. It contains much valuable information and comment, and the Committee as well as the Section on Administrative Law is deeply indebted to Miss Jennings for her generous contribution of time and talent.[1]

The Committee, through the Chairman, wrote to each of the members of the Administrative Law Section who expressed a particular interest in the work of the Committee in their responses to the Committee's initial questionnaire. Altogether some 50 additional letters and enquiries were directed to members of the Administrative Law Section, requesting additional information and comment on the Federal Register and Code of Federal Regulations. In particular the Committee, through its Chairman, wrote to each of the members who had indicated on the initial questionnaire a particular interest in loose-leaf publication of the Federal Register or Code of Federal Regulations. Each of these members of the Section was asked to comment further concerning loose-leaf publication, and in particular to give their views of the desirability of loose-leaf service if the cost of the Federal Register were to be increased substantially. The Committee has received a number of helpful and detailed replies from the members of the Section. It is unfortunately not possible to reproduce the materials and suggestions received. All of the correspondence and materials received by the Committee, both to the original and to the supplemental questionnaires, will be lodged with the Secretary of the Section for study by anyone interested in the subject.

IV. *Discussion of the Work of the Committee.* The Committee

[1] The Committee recommends that the article is of sufficient merit and general interest to warrant publication in the American Bar Association Journal.

was specially organized at the direction of the Chairman of the Section to study the Federal Register and the Code of Federal Regulations for the purpose of determining whether these publications are presently meeting the need of the legal profession for notice and publication of orders, rules, regulations, requirements, and other actions or proposed actions of the agencies of the Executive Branch of the Federal Government. In particular the Committee was faced with the question of whether the present editorial and physical format of the Federal Register and Code of Federal Regulations was as desirable, or more desirable to the legal profession than a loose-leaf service along the lines, at least in physical form, of those distributed by non-governmental commercial services.

The Committee accordingly set about to discover the extent to which the members of the Administrative Law Section—presumably the members of the legal profession most likely to be concerned with the Federal Register and the Code of Federal Regulations—actually used the publications; the extent and purpose of their use of the publications; and finally, criticisms of editorial and physical makeup and suggestions for improvements. This was the purpose of the initial questionnaire circulated by the Committee in December 1959. It seems apparent from the responses to the questionnaire that (1) there is a surprising lack of familiarity with the content and organization and uses of the Federal Register and the Code of Federal Regulations in their present form among the members of the Administrative Law Section, and (2) a relatively small percentage of the members had specific suggestions for improvement of the existing format of the Federal Register or the Code of Federal Regulations. There appeared to be, however, a general view that every effort should be made to improve the usefulness of the publications. A substantial number of the members of the Section responding appeared to believe that publication of the Federal Register or Code of Federal Regulations or portions thereof in some form of loose-leaf service might improve the utility for the particular purposes for which these members used the publications. Further correspondence, however, developed such a disparity of views among those who initially appeared to favor publication in loose-leaf form, that it is doubtful that any form of loose-leaf publication of either the Federal Register or the Code of Federal Regulations would satisfactorily meet

the varying demands and uses to which these publications are put by the interested members. Moreover, there is much opposition from other members of the Section to the loose-leaf publication.

It is evident, however, that a general publication such as the Federal Register, covering all of the agencies of the Executive Branch of Government, does not satisfy the specialized needs of groups of practitioners whose interests are centered on one or a few of the principal regulatory agencies or executive departments. These specialists require a type of publication of regulations, notices, proposals for rule-making, and orders, relating to individual agencies, which could have, because of the required specialization, only a limited circulation. The need of these attorneys nevertheless is a real one, and is only partially solved by existing commercial publications and the existing Federal Register and Code of Federal Regulations.

The attention of the Committee has been called to the work of the Association of Immigration and Nationality Lawyers in helping to meet the specialized need of the attorneys appearing before the Immigration and Naturalization Service. It has been pointed out to the Committee that the Association of Immigration and Nationality Lawyers, through arrangements with the Immigration and Naturalization Service and the Government Printing Office, receives additional prints of the regulations of the Immigration and Naturalization Service as they are printed for distribution to the field offices of the agency. These are distributed by the Association on a current basis. This arrangement enables the Association of Immigration and Nationality Lawyers to keep its membership informed on a current basis of revisions to regulations. This Committee has been informed by the Office of the Federal Register and by the Government Printing Office that such arrangements are possible in connection with other specialized areas of practice, through group arrangements with the agency involved. The additional copies made under such arrangements are relatively inexpensive.

The Office of the Federal Register has, since the work of this Committee was undertaken, made some revisions in the format of the Federal Register and its indices. These are largely technical in nature and are designed to make the publication more readable. A summary of these improvements is contained in the attached statement prepared by Mr. David C. Eberhart, Director of the

Office of the Federal Register. These editorial and procedural improvements did not originate with this Committee. At most the Committee's activities provided encouragement to the Office of the Federal Register to put contemplated improvements into immediate effect.

V. *Conclusions.* The Committee, based on the information it has obtained, has reached the following conclusions:

(1) The Federal Register and the Code of Federal Regulations should not be published in loose-leaf form. The Committee believes that a loose-leaf publication would tend to destroy the integrity of these publications as authoritative sources for orders, regulations and rules of the executive departments. A loose-leaf publication, while presenting some advantages with respect to rapid availability of current regulations, imposes difficulties with respect to the availability of the text of superseded regulations. The interest in loose-leaf publication of the Federal Register and Code of Federal Regulations evidenced by members of the Administrative Law Section is relatively small and is confined to specialist groups. It is doubtful whether a loose-leaf publication would be used by any significant number of persons.

(2) The Administrative Law Section should recommend, through any appropriate channels available to the American Bar Association, to groups and associations of attorneys or practitioners before particular administrative agencies, such as the Federal Communications Bar, the Interstate Commerce Commission Practitioners Association, and others, the availability of the procedure used by the Association of Immigration and Nationality Lawyers for the distribution on a current basis of the text of regulations, rules and orders of general application issued by Federal agencies.

(3) The Office of the Federal Register should continue its present effort to improve the Federal Register and Code of Federal Regulations so as to make these documents more readable, more understandable, and more useful, not only to the members of the legal profession but to the public generally. Some effort should be made to devise a practicable scheme for the retention of pocket supplements of the Code of Federal Regulations.

(4) The Committee recommends that the Council abolish this Committee.

The Committee would like to express appreciation to all of those assisting in its work.

EDITORIAL IMPROVEMENTS FEDERAL REGISTER AND CODE OF FEDERAL REGULATIONS

By David C. Eberhart

Director, Office of the Federal Register

The following editorial improvements in the Federal Register and Code of Federal Regulations have been made since the organization of the Committee on the Federal Register:

A. The Daily Federal Register

1. The entire front page is devoted to the daily index, with more liberal use of boldface type and "white space."

2. The front page carries, in prominent type, the inclusive page numbers covered by the issue.

3. Each principal division of each issue starts on a new page, with larger headline type. Within each division the non-codified issuances of a given agency are grouped together.

4. Boldface type and white space are stepped up for the daily codification guides (lists of CFR sections affected) and for their daily cumulations within each month.

5. The content and typography of the monthly, quarterly, and annual indices are improved (a) by a substantial increase in the subject entries and cross-references that are set in boldface in the main alphabet, and (b) by reducing analytical entries within agencies and shortening subordinate entries, making each entry easier to find.

B. Code of Federal Regulations

1. *Use Units.* As individual books are revised, they are split, where appropriate, into smaller bindings based on use. This process includes the logical rearrangement of parts within any titles or chapters that have outgrown their original pattern.

Examples of such "use units" include the following books revised as of January 1, 1960:

Title 7, Parts 210-399; Title 26, Part 1, §§ 1.01—1.499, and Part 1, § 1.500 to end of Part 19; Title 32, Parts 800-999, and Parts 1000-1099; Title 35 (formerly bound with Titles 36 and 37); Title 36; Title 37; Title 41 (formerly bound with Title 42); Title 42; Title 44 (formerly bound with Title 45); Title 45, Title 46, Parts 146-149.

Users get many obvious direct benefits from these smaller bindings. These smaller units are also conducive to more frequent supplementation, faster production, and simplified indices as reported in the following items.

2. *Supplements.* Annual issuance of cumulative supplements as of January 1 is still the usual procedure. However, as required for effective use, agencies may request semi-annual, quarterly, or even monthly supplementation of certain units. Title 46, Parts 146-149, is an example of a "use unit" that is supplemented as of January 1 and as of July 1 by request. The January 1st revision was used as a basic text by the English-speaking conferees at the 1960 International Conference on Safety of Life at Sea convened at London on May 17.

3. *Speed of Production.* Procedures have been set up to keep to a minimum the lag between the cut-off date and actual distribution of each CFR unit. Close agency cooperation, photo-offset lithography, and simplified binding are the principal new speed-up factors. Established procedures and the new factors were combined under ideal conditions to bring Title 36 (as of January 1, 1960) off the presses on December 31, 1959—a complete elimination of any lag. This feat probably never will be duplicated, but the lessons learned in achieving it are of value in keeping the overall time lag within reasonable bounds.

4. *Indexing.* The relative simplicity of the "use unit" is reflected in the indices to such units. Complex analysis is no longer called for on the scale required by a more comprehensive volume. This results in more entries in the main alphabet, simpler generic entries, and shorter subordinate entries that are easier to spot.

Procedural Improvements

The Office of the Federal Register has established a comprehensive program of assistance to agencies that is designed to promote and maintain better compliance with the spirit and the letter of the Federal Register Act and related acts and rules.

This program continues the former practice of consultation on a case by case or document by document basis. It has added:

1. A looseleaf handbook service distributed to all officials having duties pertaining to the Federal Register system. This handbook covers (a) the laws and regulations governing publication in the Federal Register system, (b) aids to drafting, (c) special procedural,

printing, editorial, and information services made available to the agencies by the Office of the Federal Register.

2. Lectures, seminars, and illustrated instruction courses supplementing the handbook and tailored to the needs of a given agency's area of interest. These courses include emphasis on looseleaf service and more frequent supplements as available means for keeping "use units" of the CFR as current as required.

3. Studies by a special group of attorneys devoted to such matters as model rules, uniform rules, applying the publication statutes and rules to actual cases, and maintaining a government-wide clearing house for the exchange of know-how in the field of rules and rule making.

It should not be assumed that the foregoing editorial and procedural improvements originated with the Committee. However it may be fairly stated that the Committee's activities provided the backing and encouragement needed by the Federal Register Office in order to put the improvements into immediate effect.

A. Alvis Layne, *Chairman*

REPORT OF THE COMMITTEE ON HEARING EXAMINERS

Resolution

Resolved, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

"RESOLUTION

"WHEREAS, Under present laws enacted by the Congress of the United States (5 U.S.C. 835 *et seq.*) civilian officers and employees of the Federal departments and establishments (the President, the President of the Senate, members of Congress, and justices and judges excepted), while traveling on official business and away from their designated posts of duties, may be allowed, in lieu of their actual expenses for subsistence, a maximum per diem allowance not to exceed the rate of $12 within the limits of the continental United States and, in case of travel beyond the limits of the continental United States, an allowance not to exceed rates established by the Director of the Bureau of the Budget for the locality in which the travel is performed; and

"WHEREAS, In the opinion of the American Bar Association such maximum per diem rate of $12 is not sufficient in the case of such civilian officers and employees of the Federal departments and establishments, including Hearing Examiners of the Federal Government, in view of the present costs of living:

"Now, Therefore, Be it Resolved, That it is the opinion of the American Bar Association that the Congress of the United States should enact legislation which would increase the maximum per diem allowance of such civilian officers and employees of the departments, including Hearing Examiners, so as adequately to reflect present costs of living: *Provided, Further, That,* it is the opinion of the American Bar Association that such increased maximum per diem allowance should not be less than $15 per day within the continental limits of the United States and that appropriate upward adjustments should also be made in the mileage allowances now prescribed by the law."

I. *Resolution Presented for Approval*

The present law provides that civilian officers and employees of the Federal departments and establishments (except justices and judges who are covered by Sections 4, 5 and 6 of Title 28, United

States Code), while traveling on official business away from their designated posts of duty, may be allowed, in lieu of their actual expenses for subsistence and all fees and tips to porters and stewards, a per diem allowance to be prescribed by the department or establishment concerned not to exceed the rate of $12 within the limits of the continental United States and, in the case of travel beyond such limits, not to exceed rates established by the Director of the Bureau of the Budget for the locality in which the travel is performed (5 U.S.C. 837). Mileage allowances may not exceed 6 cents per mile for the use of privately owned motorcycles or 10 cents per mile for the use of privately owned automobiles or airplanes (5 U.S.C. 837).

The law specifically provides that it shall not be deemed to affect any special law providing for the traveling expenses of the President of the United States, or any act providing for mileage allowances for the President of the Senate or Members of Congress (5 U.S.C. 841). There is also a provision in the law which enables the heads of departments and establishments, in the case of unusual circumstances, to authorize reimbursement for travel expenses on an actual basis but, in no event shall any such authorization exceed $25 for each day in travel status.

Under these provisions, the great mass of Federal civilian officers and employees are allowed only $12 per diem for subsistence expenses. This affects Hearing Examiners employed by the Federal Government, as well as other civilian officers and employees.

It is believed that, in view of the increased cost of travel, the Congress should authorize an increase in the basic per diem allowance to be awarded Hearing Examiners and other Federal civilian employees required to travel in the performance of their official duties.

During the 86th Congress, legislation was considered which would increase the allowance from $12 per day to $15 per day, and the mileage allowance on automobiles to 12 cents per mile (H. 5196 and S. 419, 86th Congress). These increases would be modest when consideration is given to the actual cost of living. It is believed that the Congress should enact legislation to provide for at least such small increases and that, if it deems that conditions warrant such action, it should make additional increases. The best qualified personnel can not be attracted to the position of Hearing Examiner, or any other like position, unless such employees are fully compensated for all necessary travel expenses.

Hearing Examiners, in particular, are required constantly to travel, and it is unfair and unjust to require them to pay for their costs of living from their own resources while traveling on official duty. The regular nature of their travel imposes a particular hardship upon Hearing Examiners and persons occupying like positions. Investigation reveals that a real burden is being experienced by Hearing Examiners and other like employees in view of the inadequate allowances made under present law.

Accordingly, in the interest of realistic and efficient government operation, the Congress should give this problem its immediate attention and should enact legislation to amend the present law so as to increase per diem and mileage allowances as recommended in the resolution submitted herewith.

II. *Increase of Compensation to Hearing Examiners*

Since the midyear meeting of the Association, this Committee has been active in attempts to secure increased compensation for Hearing Examiners in line with the policy of the Association reflected in the resolution adopted by the House of Delegates in 1957. In it, the Association stated that it felt that legislation should be enacted compensating Hearing Examiners at a Grade GS-18 level (82 Reports of ABA, 402-403).

A number of bills were introduced in the 86th Congress upon this subject: H.R. 10114 dealt with the Hearing Examiners of the Federal Trade Commission and provided for raising these Hearing Examiners to the GS-18 level. H.R. 10849 provided for the same treatment for Hearing Examiners of the National Labor Relations Board. H.R. 11669 provided for an amendment to Section 11 of the Administrative Procedure Act (5 U.S.C. 1010) under which two grades for Hearing Examiners would be established. The Hearing Examiners for the so-called major agencies—named in the bill—would receive compensation at a rate equivalent to that prescribed for Grade GS-18 by the Classification Act of 1949, and all other Examiners would receive compensation at a rate equivalent to that prescribed for Grade GS-15. In addition, agencies having ten or more Examiners could designate a Chief Examiner who would receive $500 per annum in addition to the foregoing rates.

None of the foregoing bills were introduced at the request of the American Bar Association, but, in each case, the Chairman of

the Section of Administrative Law, Earl W. Kintner, at the request of this Committee, informed the Congressional committees concerned of the basic position of the Association as reflected in its 1957 resolution and stated that it was felt that these bills constituted a step in the right direction.

On February 25, 1960, the United States Civil Service Commission informed the Congress that it felt that the Congress should consider an increase in compensation for Hearing Examiners, and that the Congress should also consider the possibility of making so-called supergrades available for Hearing Examiners. The Chairman of the Section, Earl W. Kintner, at the request of this Committee, informed the Congressional committees concerned that the Association felt that the suggestion made by the Civil Service Commission has merit.

As of the time of the preparation of this report, the Subcommittee on Requests for Supergrades of the House Post Office and Civil Service Committee, under the chairmanship of Representative James C. Davis, plans to hold hearings on the question of supergrades; and supergrades for Hearing Examiners will be considered. If these hearings take place, this Committee plans to take the opportunity to tell this subcommittee of the Association's position.

In the past, supergrades have not been available for Hearing Examiners because the Congress has only authorized a limited number of supergrades and, within the limitations imposed by the Congress, the Civil Service Commission has not felt that it could make any of these supergrades available for Hearing Examiners, in view of the number of Hearing Examiners—some 400—potentially eligible. The result has been to "freeze" the Hearing Examiner positions at their present levels.

If legislation is enacted which would have the effect of providing for some increase in compensation to Hearing Examiners through the medium of assigning supergrades to them, it will mean, probably, that the Civil Service Commission would be in a position to decide which of the large number of competing Hearing Examiners are entitled to supergrades made available for this purpose. For this reason, any relief under this procedure is likely to prove less satisfactory than would be the case of a bill by the Congress uniformly increasing the compensation of Hearing Examiners in line with the position of the American Bar Association that they should all be at the GS-18 level. Many persons who have

considered this matter, however, feel that it may be unrealistic to expect the Congress to adopt such legislation for all Hearing Examiners and they feel that the Congress is much more likely to adopt such a measure as H.R. 11669 that would establish two grades for Hearing Examiners but which, from an over-all standpoint, would increase the general level of compensation to persons holding this position.

This Committee, in all that it has done in this connection, has made it clear to the Congressional committees, and to everyone else, that, in the long run, the best solution to the Hearing Examiner problem is the adoption of the proposed Federal Administrative Practice Act (S-600, 86th Congress), which would provide for an independent corps of Hearing Examiners with appropriate compensation. While such legislation would provide the best long-range solution, this Committee has felt that, in the meantime, it should do everything possible to secure an immediate raise in the compensation of Hearing Examiners in line with the established policy of the American Bar Association.

III. *Selective Certification of Hearing Examiners*

In the midyear report of this Committee, attention was called to the problems which have arisen because of the approval by the Civil Service Commission of a system of selective certification of Hearing Examiners. The net effect of the system has been to permit those agencies which have entered into selective certification agreements with the Civil Service Commission, in effect, to hand-pick and choose persons appointed to the position of Hearing Examiner. With few exceptions, the selective certification agreements are so written as to make it practically impossible for persons outside the agencies to acquire the particular qualifications that make them eligible for appointment.

In that midyear report, it was also pointed out that another result of the system is to make it impossible for Hearing Examiners who have been "riffed" to compete for positions of Hearing Examiner even though such "riffed" Examiners may have had years of experience. Since the midyear meeting, the Civil Service Commission has announced changes in its regulations which, in effect, will make inapplicable to "riffed" Hearing Examiners the selective certification system, thereby making it possible for such "riffed" Examiners to secure positions when vacancies occur with-

out regard to whether they possess the special qualifications which the agencies contend their Hearing Examiners must possess. This action of the Civil Service Commission represents a distinct gain and removes one objectionable feature of the selective certification system. There remains, however, the basic objection to the system, as such.

This Committee has informed the Government Activities Subcommittee of the House Committee on Government Operations that it feels that the entire selective certification system is inconsistent with the gains made by the Administrative Procedure Act and that the American Bar Association is opposed to the system. The Congress has been urged to hold hearings upon this subject and, when it does, this Committee plans to urge the early elimination of the system.

The entire system is based upon the untenable principle that a person can not perform the functions of Hearing Examiner for a particular agency unless he has had prior experience in administering or enforcing the laws of that agency. Just one example of how this system operates may be noted by pointing out that many justices of the Supreme Court of the United States would be considered unqualified to serve as Hearing Examiners with particular agencies because such justices may not have happened to have had experience in administering or enforcing the laws of those agencies. It is the strong feeling of this Committee that the American Bar Association, through the Section of Administrative Law, should make a major effort to secure the early abandonment of the selective certification system. This Committee feels that this can be done under the standing resolution authorizing this Section to preserve the gains made by the Administrative Procedure Act; and, of course, the system would be eliminated by the passage of the Federal Administrative Practice Act.

IV. *Joint Meeting of this Committee with Federal Trial Examiners Conference*

One of the important accomplishments of this Committee during the year has been the liaison it has established with the Federal Trial Examiners Conference.* The Conference is composed of

* In years past, the Committee has also maintained liaison with the Conference and, particularly under the chairmanship of Mrs. Fanney N. Litvin, last year, the Committee and the Conference worked closely together.

those Hearing Examiners who have joined in the Association to deal with matters of common interest. It is a most effective organization and, from personal observation, it is the feeling of this Committee that the members of the Federal Trial Examiners Conference are men of high purpose and are accomplishing much which is of value to the administrative process.

Since the aims of the Conference and of this Committee are very similar, it was felt that a meeting with the Conference would be fruitful. Such a meeting was held on May 6, 1960, in Washington, D. C., at which time matters of common interest were discussed. It is the hope of this Committee that, in the future, the Committee may continue to work closely with the Federal Trial Examiners Conference in matters of mutual concern. The Conference is in a position to furnish this Committee with firsthand information concerning the practical operation of the Hearing Examiner system and, in turn, this Committee can assist the Conference by bringing to bear its influence as the representative of the organized bar in this country whenever it may be appropriate to do so.

V. *Interstate Commerce Commission*

Certain actions of the Interstate Commerce Commission with respect to its Hearing Examiners have also engaged the attention of this Committee:

(a) Earlier this year, wide publicity was given by the press to a memorandum or statement issued by the Interstate Commerce Commission to its Hearing Examiners and Attorney-Advisors, regarding their entertainment by counsel practicing before the Commission. Some members of this Committee were concerned by the manner in which this matter was handled by the Commission insofar as it tended to reflect upon the good faith of the great majority of the Hearing Examiners of the Commission. This Committee believes that, if the Commission does have a Hearing Examiner who fails to meet the proper requirements of conduct expected from a person occupying this high position, it should take appropriate action against the individual concerned. But many members of this Committee feel that, in taking such action, neither the Interstate Commerce Commission nor any other agency should do so in a way that reflects upon the entire staff of Hearing Examiners, with the attendant nationwide publicity

which inevitably follows from such broadside attacks. The Committee does not mean to point its finger at the Interstate Commerce Commission in this instance, but it does use this occasion to point out the desirability of handling the delicate matter of disciplining individual Hearing Examiners in such a way as not to reflect on the good name of the entire corps.*

(b) Effective May 1, 1960, the Interstate Commerce Commission required its Hearing Examiners to make a monthly work performance report (ICC Form No. ND 27). This was brought to the attention of the Committee and the report form was examined. It was concluded that it would be inconsistent with and detract from the gains made by the Administrative Procedure Act to require these Hearing Examiners to make the particular report on the form under consideration. Investigation disclosed that the report form was devised by managerial officials of the Commission with a view to tabulating the work performance of the various Hearing Examiners. Ostensibly for budgetary purposes, the nature of this particular report form was such that it would enable the managerial officials of the Commission to apply ratings to different Hearing Examiners—a result which is precluded by the Administrative Procedure Act. Furthermore, comparisons could be used by managerial officials in making recommendations as to promotions and like matters. It was felt that this would inevitably impinge upon the independence of judgment of the Hearing Examiners since it would make them subject to pressures which are inconsistent with true independence. Furthermore, the report form called for the use of time-clock techniques, such as reporting the exact number of hours devoted to different aspects of their work, and tabulating recess time, lunch time, and like matters.

The Hearing Examiners concerned petitioned the Civil Service Commission, asking it to determine the lawfulness of the Commission's requirement. After consultation with the officers of the Section, this Committee submitted a letter to the Chairman of the Civil Service Commission opposing the particular reporting requirement.

Unfortunately, the Civil Service Commission upheld the Interstate Commerce Commission with reference to the particular work report, but the latter was forbidden to use the report for rating purposes.

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* Of course, the Committee does not mean to imply that an agency may, itself, discipline Hearing Examiners apart from invoking appropriate procedures of the United States Civil Service Commission.

While this Committee recognizes that Hearing Examiners may properly be required to account for their activities, it is believed that the agencies do not have the same authority over Hearing Examiners as they do with respect to ordinary employees and that great care should be taken in handling this delicate matter. An informal inquiry has been made by the Committee which reveals that a number of agencies require some sort of work report to be made, but normally this is a matter of each Hearing Examiner reporting directly to his Chief Hearing Examiner. No time-clock or IBM machine techniques are generally used. Moreover, the Committee does not believe that Hearing Examiners should be made to report in such a way that the agencies can rate them since this is forbidden by the Administrative Procedure Act.

In this connection, this Committee has noted a growing tendency on the part of some of the larger agencies, such as the National Labor Relations Board, the Interstate Commerce Commission, and the Social Security Administration of the Department of Health, Education, and Welfare to employ the techniques of efficiency experts and managerial expeditors in such a way as inevitably to interfere with the normal functions of Hearing Examiners. This Committee does not believe that these techniques are any more legal or wiser than they would be in the case of employing similar techniques to expedite the work of Federal judges.

VI. *Proposals affecting Hearing Examiners of National Labor Relations Board*

The attention of this Committee has been called to a proposal made by the General Counsel of the National Labor Relations Board affecting the Board's Trial Examiners. As reported in the *Labor Relations Reporter,* BNA, Washington, 45 LRR 277, it is stated that the General Counsel of the Board has proposed that the Board "give the General Counsel's Division of Operations coordinating authority with the Chief Trial Examiner in scheduling hearings in unfair labor practice cases." It is understood that, under this proposal, the General Counsel's Division of Operations would take responsibility for setting hearing dates and the initial calendaring of regional office requests for hearing.

So far as this Committee knows, no action has been taken by the Board concerning this proposal of the General Counsel. Clearly, however, such step would interfere with the performance

of the duties imposed upon Hearing Examiners by the Administrative Procedure Act. Accordingly, the Committee feels that it should bring this to the attention of the Section.

VII. *Hearing Examiners under the Social Security Act, 1939*

Throughout the year, this Committee has been deeply concerned with the status of Hearing Examiners who conduct proceedings under Title II of the Social Security Act, 1939, as amended. Last fall, the Chairman of the Section, Earl W. Kintner, appeared before the Subcommittee on Administration of the Social Security Laws, House Committee on Ways and Means, and expressed the concern of this Association with the manner in which the agency is dealing with its Hearing Examiners. For one thing, it was made clear that the American Bar Association opposes the exemptions from Section 11 of the Administrative Procedure Act granted by the Congress to that agency, under which Hearing Examiners may be selected, until December 31, 1960, who do not meet the qualifications of the Administrative Procedure Act. For another thing, the Congressional committee was advised that the American Bar Association was concerned with the degree of supervision apparently sought to be imposed upon Hearing Examiners.

On March 11, 1960, the Subcommittee issued its preliminary report in which it indicated that it concurred in the views of the American Bar Association as expressed by Mr. Kintner.

Aside from this, throughout the year, this Committee has received information concerning problems which affect the individual Hearing Examiners in that agency. Such information as has come to the Committee in the past has indicated that the agency, by means of supervising and advising its Hearing Examiners, may have interfered in some cases with the independent manner in which they are supposed to function.

The most recent information which has come to this Committee is to the effect that the Social Security Administration has made a number of cash awards to Hearing Examiners of that agency for "outstanding service." This was done without the approval of the Civil Service Commission. Certainly, this situation must be closely watched by this Committee in the future if the integrity of the Hearing Examiners is to be maintained.

VIII. *Conclusion*

In submitting this final report, the Committe desires to state some of the conclusions which have been reached by the Committee as a result of its experiences this year:

(1) This Committee performs a most important function. From an organizational standpoint, it is believed that the Committee is much too large for the most efficient and effective operation. Many matters have come to the attention of the Chairman of the Committee with respect to which no action could be taken because of the impossibility of communicating with the 31 members of the Committee scattered all over the country in time to make such action effective. Accordingly, it is believed that, hereafter, this particular Committee should be made considerably smaller and that its members should be carefully hand-picked from among those who have an active interest in this particular subject and who are willing to work somewhat harder than an ordinary committee member works. This is true because the work of this Committee, if properly performed, is a regular and continuous activity. It is not sporadic or occasional.

(2) No one could serve upon this Committee without arriving at a conviction that many forces are operating to detract from the gains made by the Administrative Procedure Act insofar as Hearing Examiners are concerned. Some of these factors have been mentioned in this report, such as the managerial and efficiency experts and techniques which are being employed by agencies in increasing numbers. There are also those who honestly feel that the Hearing Examiner "remains an underling" (*Administrative Law Treatise,* Davis, Vol. 2, Sec. 10.06), and that his position should not be exalted.

This Committee believes that the American Bar Association is unalterably opposed to this philosophy. The Committee believes, also with the Supreme Court of the United States, in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, that a partially independent status at least has been given to Hearing Examiners by the Congress. They are not ordinary Federal employees.

The Committee further believes that one of the principal means of improving the entire administrative process is to improve the status and independence of Hearing Examiners. It is important not only to bear in mind what the law *is,* but what the law *should be,* with respect to Hearing Examiners. This Association should

exert every effort towards improving the law by increasing the importance of the position of Hearing Examiner and by attracting qualified individuals to this office.

This means very specifically that this Association should be unceasingly active in pressing for the passage of the Federal Administrative Practice Act, and that, in the meantime, it should press for an increase in the pay and allowances of Hearing Examiners.

Finally, it must be ever vigilant in ferreting out every instance in which the Federal agencies take action affecting Hearing Examiners so that the agency action may be approved and upheld if it is consistent with the purposes and aims of the Association and so that such action may be exposed whenever it is designed to detract from the status and independence of Hearing Examiners.

JESSE E. BASKETTE, *Chairman*

Mrs. Fanney N. Litvin, a Vice Chairman of the Committee, does not concur in the recommendation for the adoption of a proposed Resolution relating to per diem allowances for Hearing Examiners because she feels that Hearing Examiners are but a part of a larger group of government officials affected by this matter and that, therefore, this subject is not a proper matter for consideration by this Committee.

REPORT OF THE JUNIOR BAR CONFERENCE COMMITTEE

This Committee commenced its work this year with correspondence among its members regarding the objectives of the Committee. It was decided that the primary objective of the Committee should be a continuance of efforts to obtain older JBC members and recent JBC graduates for entry into the Administrative Law Section. With this in mind, the Committee has arranged for our access to a list of all JBC members, with a list of the sections to which each JBC member belongs.

It is recommended that the Chairman of the Administrative Law Section should—on an annual basis—invite all JBC members to join the Section. An appropriate form letter could be sent to all JBC members, inviting them to attend the Section's Annual Meeting program and to join the Section.

This Committee has also considered the presentation of "bread and butter" programs for all young lawyers in the field of administrative law. The assistance of this Section has been offered to the Junior Bar Conference.

JAMES J. BIERBOWER, *Chairman*

REPORT OF THE COMMITTEE ON IMMIGRATION AND NATIONALITY

The Committee has no recommendations or resolutions requiring the action of the Section or House of Delegates at its Annual Meeting, but submits this report for informational purposes:

I. *Committee Resolutions Approved by the House of Delegates at its Mid-year Meeting held in Chicago on February 23rd, 1960*

1. That a ten year Statute of Limitations be enacted to apply to deportation proceedings, except that such period of limitation shall not apply to deportation proceedings based upon a crime for which the death penalty may be imposed.

2. (a) That fourteen days advance notice of deportation be required.

(b) That a stay of deportation be granted pending judicial review "unless previous action has been brought and denied for the same relief or unless the Court otherwise directs."

3. That final administrative appeals should lie to the Board of Immigration Appeals from all decisions of District Directors, Regional Commissioners and Special Inquiry Officers under the Immigration and Nationality Laws.

II. *Existing Resolutions Approved by Earlier Sessions of the Board of Governors and/or House of Delegates*

1. That a Board of Visa Appeals with review powers be established.

2. That exclusion of aliens must be based upon record evidence taken at a hearing provided that confidential information in security cases be safeguarded.

3. That Hearing Officers be appointed and govern under the provisions of the Administrative Procedure Act.

4. That all persons who claim to be nationals of the United States shall be entitled to a judicial determination of such claim.

5. That judicial review of deportation and exclusion orders be governed by Section 10 of the Administrative Procedure Act and that legislation designed to restrict judicial review of such orders be opposed.

6. That the Board of Immigration Appeals be granted statutory status and authority.

7. That the Immigration and Nationality responsibilities now vested by law in the Department of State and in the Attorney

General be consolidated into the Department of Justice or an independent agency of government.

III. *Areas of Study or Investigation by Subcommittees*

1. *Precedent Decisions*

(a) The advisability of seeking either a substantial increase in the number of decisions (Attorney General, Board of Immigration Appeals and the Commissioner of Immigration & Naturalization) designated as precedents or the designation and publication of all decisions as precedents.

(b) Methods of making precedent decisions available in digest form or otherwise on a weekly basis to overcome the existing time lag from time of decision to public availability.

2. *Applicability of APA Standards to the Deportation and Exclusion Hearing and other Administrative Matters in this Field*

The deportation hearing has been exempted by statute from applicability of APA. A study is being made as to whether improvement ought to be sought looking towards voluntary compliance with Hearing Officer appointment procedures provided in the APA, and whether in other respects APA standards ought to be sought in the deportation and exclusion process. Also, whether APA requirements of notice of rulemaking are being met in connection with promulgation of visa regulations.

If appropriate, alternative voluntary administrative procedures are to be suggested by the Committee with specific indications of how existing procedures would thereby be improved.

3. *Filing Fees in Immigration and Nationality Matters*

Some filing fees are fixed by statute, others by regulation. Study is being made of the fairness of filing fees imposed, particularly by administrative action when compared with fees required by other agencies.

4. *Overall Study of the Administrative Process in Deportation, Exclusion and Adjustment Procedures*

A preliminary examination of this matter is being made with a view to a proposal in broad outline of the areas of appropriate study, if deemed necessary and the best means of accomplishing this, possibly by way of subsidy through grant.

IV. *Judicial, Administrative and Legislative Highlights in the Immigration and Nationality Field During the Current Year*

The Committee has determined that a service would be rendered to the bar by the inclusion in the Committee's Annual Report of the highlights in the areas mentioned. These are appended to this report.

GUSTAV LAZARUS, *Chairman*

APPENDIX TO REPORT OF THE COMMITTEE ON IMMIGRATION AND NATIONALITY

A—JUDICIAL HIGHLIGHTS

BY JACK WASSERMAN

Five cases involving aliens, deportation and citizenship were argued in the Supreme Court during the October, 1959, Term which is now drawing to a close.

Abel v. *United States,* 362 U.S. 217, 4 L. ed. 2d 668, presented the validity of a conviction for conspiracy to commit espionage. The F.B.I. after investigation of the espionage activities of Abel advised the Immigration Service that he might be an alien illegally in the United States. Abel was then arrested upon an administrative deportation warrant, his person and luggage were searched and certain articles were seized. After he checked out of his hotel room where he was arrested, the F.B.I. seized additional articles left in the room. In a five to four decision, the Supreme Court upheld the good faith of the Immigration Service's action against a Fourth Amendment attack and a claim that it was an improper means of obtaining evidence for a criminal prosecution. The Court emphasized that its view "of the matter would be totally different had the evidence established * * * that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions rather than as a bona fide preliminary step in a deportation proceeding." The claim that the administrative warrant violated the Fourth Amendment was dismissed upon the ground that it was not raised below and with the observation that statutes "authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time." Since the Fourth Amendment was primarily directed against criminal searches, defendant was not entitled to its protection in a civil deportation arrest.

Nevertheless, "government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law enforcement officers." The dissenting opinions contended that the F.B.I. used an administrative warrant to make an arrest for criminal investigation in violation of the Immigration and Nationality Act and the Fourth Amendment. They viewed an executive arrest "so unconfined by any safeguards that it cannot be countenanced as consistent with the Fourth Amendment."

Mackey v. *Mendoza-Martinez,* 362 U.S. —, 4 L. ed. 2d 812, presented the constitutionality of expatriating a citizen of the United States who had been convicted of remaining in Mexico for the purpose of avoiding military service. Although the nonconstitutional question as to whether the conviction collaterally estopped the Government from raising the issue of expatriation had not been presented below or raised on this direct appeal by the parties, the Supreme Court, by a divided vote, remanded the cause for exploration of this new point.

Niukkanen v. *McAlexander,* 362 U.S. —, 4 L. ed. 2d 816, involved the deportation of an alien resident here since 1909 who joined the Communist Party from 1937 to 1939 but who did not understand the ideology of that organization (according to the dissenting opinion). The lower courts found that petitioner perjured himself in denying Communist Party membership and the majority of the Supreme Court was not disposed to set aside its findings upholding deportation. Four dissenting members found the evidence far too meager to establish meaningful membership required by *Rowoldt* v. *Perfetto,* 355 U.S. 115. Senator Morse introduced a private bill for Niukkanen's relief on May 13, 1960, when the case was the subject of extended remarks and a plea to reverse the majority of the court.

Kim v. *Rosenberg,* 263 F 2d 733 (C.A. 9), has been argued in Supreme Court and a decision should be rendered before adjournment. Involved is the right to deny discretionary relief in the form of suspension of deportation to an alien who has refused to answer questions upon the claim of self-incrimination.

Fleming v. *Nestor,* 169 F. Supp. 922, presented to the Supreme Court the issue whether a deported alien could be deprived of social security benefits.

Scheduled for argument during the next term of the Supreme Court are four denaturalization cases in which certiorari has been

granted. *Chaunt* v. *United States,* 270 F. 2d 179 (C.A. 9); *Polites* v. *United States,* 24 F.R.D. 401; *United States* v. *Lucchese* (C.A. 2); and *Costello* v. *United States* (C.A. 2), involve the sufficiency of evidence in denaturalization litigation, a motion to reopen under Rule 60(b), and the effect of dismissals of denaturalization actions for failure to supply a proper affidavit of good cause.

Mew v. *Jones,* 268 F 2d 376 (C.A. 9, 1959), limits the authority of the Immigration Service to subpoena and question persons suspected of maintaining illegal residence in the United States. 8 U.S.C. 1225 is inapplicable where there is no pending proceeding under the immigration laws. The decision states that the subpoena power is limited to exclusion cases and that it may not be utilized to require a person in the United States to give evidence regarding his citizenship.

Cavillo v. *Robinson,* 271 F. 2d 249 (C.A. 7, 1959), should shed new light upon a problem that has been see-sawing with conflicting answers through the years. It holds that failure to disclose prior residence in the United States does not support a deportation order based upon the ground that the alien secured his visa by wilful misrepresentation of a material fact.

In *Worthy* v. *Herter,* 270 F. 2d 905 (C.A. D.C., 1959), certiorari denied, December 7, 1959, the Secretary of State's power to deny a newsman a passport to travel to communist countries was upheld. The same decision was reached in an action instituted by a Congressman. *Porter* v. *Herter* (C.A. D.C., 1960).

An uncorroborated extra-judicial admission by a native-born American that he voted in a foreign political election was held insufficient to serve as a basis for expatriation in *Manuel Gonzalez-Jasso* v. *Rogers* (C.A. D.C., March 5, 1959).

Following the debatable precedent of *United States* v. *Archer,* 51 F. Supp. 708 (D.C. S.D. Calif., 1943), *United States* v. *Rodriguez* (D.C. S.D. Calif., March 29, 1960), holds that an alien who makes a false statement before an American Consul abroad may be prosecuted for violation of Section 1546 of the Criminal Code even though the offense was committed outside United States territorial limits.

Sheng v. *Rogers,* 177 F. Supp. 281 (D.C. Dist. of Col., 1959; appeal pending), held that an alien deportee could only be expelled to a country and that Formosa was not a country under the immigration statute, 8 U.S.C. 1253. A contrary conclusion was reached, however, with regard to deportation to Hong Kong.

Ying v. *Rogers* (Civil Action 2927-59, Dist. of Col. Feb. 16, 1960; appeal pending). In *Tie Sing* v. *Esperdy,* 266 F. 2d 957 (C.A. 2, 1959, cert. denied, October 12, 1959), deportation to the Netherlands was authorized upon a showing that such country would receive the alien only as a deportee, but not for permanent residence.

Jurisdictional problems still beset the immigration practitioner seeking judicial review. On May 5, 1960, the Ninth Circuit affirmed a ruling in *Sato et al.* v. *Dulles,* dismissing a complaint for lack of jurisdiction. The action was based upon 8 U.S.C. 903. In what may be properly regarded as *dicta,* the Court held that declaratory judgment relief was unavailable to a native-born American presently abroad who asserted improper denial of passports. The State Department ruling of expatriation rendered in 1956 for voting in foreign elections would seem to preclude jurisdiction over the Secretary of State in Hawaii under the 1940 Act (8 U.S.C. 903). Nevertheless, the Court went on to say that the validity of the expatriation ruling could only be tested in habeas corpus proceedings and not otherwise under the 1952 Act (8 U.S.C. 1503).

In *Angelis* v. *Bouchard* (Civil Action 883-59, D.C. N.J.), the Court dismissed a complaint seeking review of adjustment of status under 8 U.S.C. 1255 upon the ground that such review is precluded because the administrative action was committed to agency discretion. Despite this questionable conclusion, the Court went on to state that the alien was ineligible for adjustment in view of his illegal entry.

B—ADMINISTRATIVE HIGHLIGHTS

By Thomas J. Griffin

The published decisions of the Board of Immigration Appeals and the Immigration and Naturalization Service within the past twelve months again demonstrate how highly technical, varied, and difficult are the problems that arise under the immigration laws. To select, in the space allocated, the administrative highlights therefore becomes a task that can only be accomplished by arbitrary choice. The selections of the writer have been made with the hope that they will prove to be of general interest to the practitioner.

An interesting case arose in the field of expatriation in *Matter of G-C-,* Interim Decision 1034, decided by the Board on Decem-

ber 28, 1959. The matter came about in exclusion proceedings and the charge was that the appellant was excludable as an immigrant not in possession of an unexpired immigrant visa (Act of 1952, Section 212(a)(20)).

The appellant was born in Italy on September 19, 1933 and arrived in New York City on July 8, 1958 to apply for admission as a United States citizen. He was in possession of a United States passport issued to him in Italy on June 8, 1958 and it was valid for a return journey to the United States until August 8, 1958. He was paroled into the United States under Section 212(d)(5) of the Act of 1952, pending a determination of his admission as a United States citizen. The special inquiry officer, after finding him admissible as a United States citizen, certified the case to the Board of Immigration Appeals.

The facts were that the appellant's father was born in Italy and naturalized a United States citizen on June 14, 1926. He was married to a native-born United States citizen in Italy on April 23, 1930. The appellant was born in Italy two months after his father had last returned to Italy, where he thereafter continually resided. The United States Department of State on April 7, 1958 issued a Certificate of Expatriation to the appellant's father, indicating that he expatriated himself on or about June 29, 1935 by having automatically naturalized as an Italian under Italian Law and accepted such naturalization by residing in Italy continuously without documentation as a United States citizen from July 1933 to January 15, 1958, the date that the appellant applied for a United States passport. The appellant acquired Italian nationality in July 1935 when his father acquired Italian nationality. Consequently, at the age of two the appellant was a dual national.

Under these facts, Section 401 of the Nationality Act of 1940 would have called for the appellant's expatriation if he did not take up permanent residence in the United States by the time he reached the age of 23. However, that Act was repealed by the Immigration and Nationality Act of December 24, 1952, and the issue then became whether Section 401 of the 1940 Act applied, and consequently expatriated the appellant, or whether Section 349(a)(1) of the Immigration and Nationality Act of 1952 applied. That latter section afforded the appellant the opportunity to retain his United States citizenship if he applied for permanent residence in the United States prior to his 25th birthday.

The Board of Immigration Appeals concluded that since the subject was only 19 years of age and still a United States citizen on December 24, 1952, the more liberal provisions of Section 349(a)(1) of the 1952 Act must govern the case. The Board held that the expatriation of the father in July of 1935 was merely a condition precedent to the appellant's possible expatriation, which depended on his subsequent conduct up to and including the expiration of the defined limits specified in the statute in effect at the time he made an election for nationality. The order of the special inquiry officer admitting the appellant as a United States citizen was accordingly approved.

The Board of Immigration Appeals published two interesting decisions based on Section 101(f)(6) of the 1952 Act. On June 29, 1959, *Matter of L-D-E-,* Interim Decision 1011, was decided by the Board. That case pertained to a male citizen of China, who had last entered the United States in 1941 when he secured admission on his fraudulent claim to United States citizenship. An Order to Show Cause was issued charging that the respondent was excludable at entry under 8USC 213(a) (1946 Ed.)—No immigration visa.

The respondent, at the time of his admission in 1935, claimed that he was the son of a native-born citizen and he gave a name other than his own. In 1941, he secured readmission by continuing the original deception. On December 28, 1956, he executed an application for a United States passport, again claiming to be the son of a United States citizen and again giving the same false name. Testimony of the respondent indicated that after he made the application for a passport in 1956, he was requested to appear for an interview at the passport office in New York City, but he did not do so and never did receive a United States passport. The issue in the case was whether the respondent's false statement in his passport application constituted "testimony" within the meaning of 8 USC 1101(f)(6).

The Board of Immigration Appeals, in deciding this issue, considered the case of *Orlando* v. *Robinson,* 262 F. 2d 850 (cert. denied 359 U.S. 989 (1959)), and *Sharaiha* v. *Hoy,* 169 F. Supp. 598 (S.D. Calif., (1959)) and concluded that false statements which appear in an application, whether or not under oath, do not constitute "testimony" within the meaning of 8 USC 1101(F)(6). The Board, in so deciding, specifically overruled *Matter of Z-,* 5 I&N

Dec. 514. Upon this conclusion, the Board then stated that: "* * * the question of whether a finding of good moral character should or should not be made in view of the false statement must be determined in accordance with the last sentence of 8 USC 1101(f) rather than under paragraph (6). Since it was solely on the basis of 8 USC 1101(f)(6) that the special inquiry officer held that discretionary relief could not be granted, we will remand the case to him for further consideration of the application for suspension of deportation."

A companion case to the one just discussed is *Matter of G-L-T-,* Interim Decision 1012, decided by the Board on July 1, 1959. This matter was also in deportation proceedings and the charge again was under 8 USC 213(a) (1946 Ed.)—No immigration visa. The special inquiry officer in that case had directed the respondent's deportation and had denied his application for relief under 8 USC 1254(a)(1). The Board had dismissed an appeal from that decision and the matter was again before it on motion by the respondent's counsel.

The respondent was a Chinese male who had last entered the United States on October 15, 1949 when he was admitted as a United States citizen—the son of a native-born citizen. Actually, he had never been a citizen of the United States and such was conceded prior to the submission of the motion. After his original entry in 1940, he continued to claim citizenship on various occasions until January 1955, when he admitted alienage while being questioned by the officers of the Department of State. However, on the basis of his fraudulent claim he had obtained a Certificate of Citizenship in 1947, which had been stolen from him in 1953. He thereafter in 1954 made application for a certificate to replace the stolen one and at that time, while being questioned under oath by an officer of the Immigration and Naturalization Service, stated that he was a United States citizen.

The Board concluded that his statements made orally under oath in 1954 constituted false testimony within the meaning of 8 USC 1101(f)(6) and that the respondent's case was not considered to be within the purview of *Sharaiha* v. *Hoy,* 169 F. Supp. 598 (S.D. Calif. (1959)). The question and answer statement showed that the respondent was advised concerning the official identity of the Immigration officer, that he was informed that the statement must be voluntary, that it might be used as evidence in

a subsequent proceeding, that he was placed under oath and warned of the penalty for perjury.

The Board, in view of the foregoing, held that a finding of good moral character was precluded and that the respondent was ineligible for relief. The motion was accordingly denied.

The exchange visitor program has generated wide interest and has been the subject of many controversies. On November 23, 1959, *Matter of Z- and R-*, Interim Decision 1028, was decided by the Assistant Commissioner. This case involved two aliens, both single male citizens of Italy. One had entered the United States in February 1957 as an exchange visitor. The other had been admitted on January 4, 1958, also as an exchange visitor; both for the purpose of receiving further training as electronic engineers and both had continued to maintain their status until the time when they each applied for change of nonimmigrant status to treaty merchant under Section 101(a)(5)(E) of the Immigration and Nationality Act.

Both of the applicants were to be employed by the same corporation in research and development work on an electronic computor. The time to complete such work was estimated at approximately three years, at which time they were to return to Italy where the computor was to be manufactured. It was noted in the opinion that the employer was a Massachusetts corporation, a wholly-owned subsidiary of an Italian corporation.

The Assistant Commissioner held that Section 248 provided no restriction in the change of nonimmigrant status which was sought by the applicants. However, it was pointed out in the opinion that such adjustment of status did not in any way constitute a waiver of the two years foreign residence requirement present in all cases of aliens admitted as exchange visitors. Upon a finding that the applicants herein were bona fide visitors, a change of nonimmigrant status from exchange visitor to treaty merchant was granted.

C. LEGISLATIVE HIGHLIGHTS

By Harry N. Rosenfield

Congressional Action

With the Congressional Session drawing to an early close, immigration legislation faces its customary race with the adjourn-

ment date. As this report is being written, a month before adjournment, the major focus is in the Senate on the four bills already passed by the House:

1. H.R. 9385 makes possession of marihuana an excludable and deportable offense, liberalizes the provisions on adjustment of status for aliens in the U.S., grants non-quota status to the spouses and children of first preference aliens, and permits issuance of visitors visas, for a 3-month period, to the fiancees of American citizens, under certain safeguards against abuse.

2. H.R. 10419 amends PL 85-892 by adding 500 to the special nonquota visas previously authorized for distressed natives of the Azores and by increasing the special quota for Dutch nationals displaced from Indonesia by the equivalent of one year's immigration quota for The Netherlands; it also extends for one year, the special provisions for entry of orphans, which otherwise expire on June 30, 1960.

3. H.J. Res. 397 extends until July 1, 1962, the Attorney General's authority to parole into the U.S. refugee-escapees, as defined in the Act of September 11, 1957, provided that they are within the mandate of the UN High Commissioner for Refugees. The total limitation is set at 25% of the number resettled outside of the U.S. in the preceding 6 months' period.

4. H.R. 2807 limits judicial review of orders of deportation and exclusion. For earlier reports on this legislation, see 10 *Ad. Law Bull.* 75, 159, and 11 *Ad. Law Bull.* 31.

There is a proposal within the Senate Judiciary Committee, to combine the first three of the above-described bills in a single omnibus bill, with H.J. Res. 397 being amended to conform with S. 3513 in respect of several eligibility factors. Thus amended, plus some other minor amendments, there is reasonable hope for enactment this session of H.R. 9385, H.R. 10419 and H.J. Res. 397.

The Chairman of the Senate Judiciary Committee has given assurances that H.R. 2807 would not be acted upon before hearings. Since no such hearings have been scheduled, it is perhaps unlikely this bill will be passed this session. The ABA is on record as opposed to its enactment.

The considerable activity in Congress on passport legislation will, presumably, be reported upon by another Committee.

Presidential Message

The President transmitted to the Congress a special message on immigration and refugees, which proposed doubling of quota immigration, important changes in the national origins quota system and special provision for refugees. In particular, he recommended the following proposals, among others, in connection with the regular immigration law:

1. use of the 1960, instead of the 1920, census to determine the numerical limitation on annual admission;
2. distribution of the resulting increased quotas by allocation on the basis of the number of immigrants actually accepted from each area between 1924 and 1959;
3. redistribution of unused quotas among countries with oversubscribed quotas; and
4. elimination of the numerical ceiling on quotas within the Asia-Pacific triangle.

No hearings were held, and no action was taken on these Administration proposals, S. 3225 and H.R. 11235.

REPORT OF THE COMMITTEE ON IMPROVEMENT OF ADMINISTRATIVE PROCEDURE

As reported in a preliminary report to the Council at the Council's midyear meeting in Chicago, this Committee held meetings in Washington, D. C., on the dates January 8, 1960 and February 16, 1960.

The Committee at these meetings and by means of written comments from individual members has concerned itself with determining appropriate areas in which general recommendations on improvement of administrative procedure could be developed. However, the possible subject matters are so numerous that it has been difficult to select subject matters which could feasibly be dealt with. The problem of selection is also complicated by the uncertainty as to the extent to which any particular matter relating to improvement of administrative procedure would be the subject of overlapping work by other Committees.

In the meetings which have been held there has been a consensus of opinion that one of the most important areas requiring attention concerns the long delays and the voluminous and costly records involved in administrative proceedings. The Committee has felt that one approach to the problem may be the prescription of a uniform code of federal administrative procedure and practice. The Committee, therefore attempted to concentrate on a bill introduced on January 19, 1960 in the United States Senate by Senators Dirksen, Wiley and Hruska, the purpose of which is "to prescribe a Federal Code of Administrative Practice." While this bill is most voluminous and covers a very broad field, this Committee in its meeting of February 16, 1960, tried to develop some general views. These were later supplemented by written comments received by mail from individual Committee members. In general, these views may be summarized as follows:

1. The bill is a commendable effort in the direction of a much needed uniform code of federal administrative practice, but the bill in its present form does not appear to be suitable.

2. The drafters of the bill appear to have attempted to transplant existing rules of civil procedure, which were designed for application to adjudication of private controversies, without sufficient study as to their suitability in administrative proceedings. Indeed,

there is little in the bill that could feasibly be applied in administrative proceedings.

3. In many respects the provisions of the bill are inconsistent with desirable procedural innovations introduced by the passage of the Administrative Procedure Act (e.g., the "Hearing Commissioner" procedure, which appears to be an adoption of the special master concept under the rules of civil procedure, and would apparently do away with the concepts of independent hearing examiners, initial decisions, etc.).

4. The intended applicability of the bill is confusing. It seems to be concerned with proceedings in which monetary relief is involved, and administrative proceedings are rarely concerned with claims for monetary relief.

5. Unduly complicated procedures would be established with respect to pleadings, motions, etc., which, rather than expedite administrative proceedings, would appear to cause extensive delay. The bill attempts to deal with minute details and attempts to prescribe uniformity in areas where uniformity is obviously undesirable (e.g., time limitations upon filing pleadings, answers, etc.).

6. The bill unnecessarily and undesirably would change the established methods of judicial review, by replacing appeals from agency action, now generally in the U.S. Court of Appeals, with review by the United States District Courts.

7. The bill, desirably, would introduce discovery procedures in administrative proceedings but unfortunately the procedures prescribed do not appear to be suitable or adequate in many respects.

In view of the foregoing, if the Association is called upon at any early date to take a position on this bill, it would seem that the only recommendation possible at this time is that enactment of the bill in its present form is undesirable and that rather than to attempt to develop the very extensive amendments which would be required, an entirely new bill be drafted based upon specific recommendations developed by an appropriate committee or committees of the Section.

The Chairman of your committee makes the following further observation to the Council based upon his experience with this Committee. A committee as large as this one has been (almost 100 members) is too unwieldy and cannot function most effectively, particularly when the membership is scattered throughout the country. Even the simple tasks of scheduling meetings, preparing and mailing notices, etc., become complex and time-consuming.

Some thought should be given, therefore, to streamlining of the Committee organization. Equally important is the necessity for the establishment of some specific guidelines defining the scope of the functions of the Committee. So far as can be ascertained, the scope of the Committee's functions is as broad as may be inferred from its all-inclusive title. Other committees have been established in recent years which have apparently been concerned with the same or similar subject matters. Without some coordinating effort at a higher level, overlapping frequently occurs and work may be duplicated without awareness of such fact by the respective committees concerned.

The Chairman of your Committee takes this opportunity to express his appreciation for the opportunity of heading the Committee and for the assistance of the many members of the Committee who have actively interested themselves in its work.

BENEDICT P. COTTONE, *Chairman*

REPORT OF THE COMMITTEE ON INDIAN MATTERS

Once again this year the activities of the Committee on Indian Matters have served to focus attention upon areas where improvements can be made in aspects of Indian affairs involving administrative law. Exchanges of ideas by members of the committee have led to affirmative individual action in certain instances, committee action in other instances, and have served to keep administrative officials and practitioners better aware of recent developments in the field.

1. *Supervision over attorneys' contracts with Indian tribes.* Since our committee report a year ago, supervision over attorneys' contracts with Indian tribes has been transferred from the Commissioner of Indian Affairs to the Solicitor of the Department of the Interior. It had long been suggested that the Solicitor could better perform the responsibility of supervision, inasmuch as that responsibility involved problems related to performance of professional services by attorneys for clients. A little more than a year ago the committee membership was circulated and indicated a consensus in favor of the transfer of jurisdiction from the Bureau of Indian Affairs to the Solicitor.

As might be expected in connection with any transfer of function, it has taken time for the Solicitor's Office to become acquainted with its new responsibility.

A number of problems have developed. However, progress is being made in improving practices. The chairman of the committee has corresponded with the Solicitor of the Department of the Interior urging that before any new rules and regulations were adopted, dealing with the administration of attorneys' contracts, that practitioners be allowed to comment on any proposed regulations. The Solicitor has indicated that it is unnecessary to await the publication of proposed rules before submitting comments. Therefore, the committee chairman has circulated the committee members, furnishing a copy of the old B.I.A. rules and manual, requesting that pertinent comments be furnished. The committee membership is now in the process of furnishing such comments to the chairman and subcommittee, who will compile them for approval by the committee and submission to the Solicitor for his assistance in determining administrative action.

At the present time, it seems to be the consensus of the committee that in fact the review by the Solicitor has been superimposed upon previous review by the Bureau of Indian Affairs and that the transfer of functions has merely added to previous practice another layer of administrative and legal review. It is hoped that much of the review and analysis by the Bureau of Indian Affairs will be eliminated when this new process is finally culminated.

2. *A program to complete and bring up to date Kappler's Indian Affairs, Laws and Treaties.* At the present time there is no complete and up-to-date compilation of Federal statutes relating to Indian affairs. The basic compilation of legislation in this complex field is Kappler, Indian Affairs—Laws and Treaties, the first two volumes of which were published in 1904 by the Government Printing Office under the direction of the then Senate Committee on Indian Affairs. Three supplemental volumes subsequently were prepared by Mr. Kappler under the direction of the Committee and were published in 1913, 1929, and 1941, respectively, by the Government Printing Office. Although the last of these volumes covers only treaties and acts of Congress affecting Indians down to June 29, 1938, there has been no publication to bring the text of these treaties and acts of Congress up to date. In addition, experience has shown that a number of items were omitted from the compilation for the period covered by Mr. Kappler. At the last annual meeting the Committee on Indian Matters suggested a resolution to be adopted by the Council, the Board of Governors and House of Delegates, favoring the publication of an up-dating of Kappler's Laws and Treaties. However, the Council felt this matter was within the jurisdiction of the Section on Mineral Law, inasmuch as it involves the substantive question rather than an administrative practice matter.

Accordingly, the committee has continued to coordinate with representatives of the Section on Mineral Law and with the Committee on Indian Law of the Federal Bar Association to see if arrangements could be made for this publication. A subcommittee has met with representatives of the F.B.A. and with representatives of the Senate and House Interior Committees, urging the publication of an up-dated volume. Our subcommittee has made affirmative proposals to the F.B.A. and the Mineral Law Section as to how the up-dating might be accomplished. Members of our committee have volunteered their professional services to

participate in the up-dating process. However, in view of the position of the Council, no affirmative action has been taken to accomplish the publication through the auspices of the Section of Administrative Law and no resolution is now proposed in connection with this for consideration by the Board of Governors and the House of Delegates.

It is still the view of the committee that this publication should be accomplished through proper auspices at the earliest possible date and the members of this committee should cooperate in the professional work necessary for its publication, in the event that the House or Senate Committee or the Department of the Interior cannot be prevailed upon to accomplish the publication.

3. *Practice of the Department of the Interior with respect to service of process or its equivalent upon individual Indians or Indian tribes in protests, contests, and appeals arising out of decisions of the Bureau of Indian Affairs and the Bureau of Land Management.* The individual members of our committee have filed comments on proposed rules for handling appeals within the Bureau of Indian Affairs and the Department of the Interior, promulgated in the Federal Register of November 28, 1959. One of the great areas which needs further consideration is for proper notification of attorneys representing Indian tribes and individual Indians where applications and proceedings are before the Bureau of Land Management. For example, there have been filings on some Indian reservations alleging to the Bureau of Land Management that lands within boundaries of the reservations are really public lands of the United States. Counsel for some Indian tribes have encountered a good deal of difficulty in obtaining notice of some of these applications. This is a matter which might profitably receive further study by the committee and the Department of the Interior.

4. *Improving procedure and speeding up handling of Indian claims matters by the Indian Claims Commission.* This is an area of considerable controversy and requires the representation of divergent points of view. To assist in this, two members of our committee presented papers at the annual meeting of the Federal Bar Association, Committee on Indian Law, in September of 1959. Ralph A. Barney, Esq., Chief of the Indian Claims Section of the Lands Division of the Department of Justice, presented the point of view of the defendant. The chairman of our committee presented the point of view of the Indian claimant, both speakers

listing a number of ways in which procedure before the Indian Claims Commission could be facilitated. The work of the committee this year has indicated that experienced members of the committee feel much might be accomplished by pretrial conferences and narrowing the issues. We are pleased to report that much has been accomplished in the past year in the area of settlement of controversies, a substantial shift from prior practice.

5. *Worthwhile remaining projects.* The work of the committee has developed a number of other projects or areas worthy of future consideration. For record purposes, I am listing the more important ones below:

a. A development of rules and regulations pertaining to enrollment and disenrollment of individual Indians in tribal organizations and appeals therefrom.

b. Inquiry into the administrative practice of Indian probate examiners, including the question of the application of the Administrative Procedure Act to those proceedings in the Bureau of Indian Affairs and the positions of Indian probate examiners.

c. Consideration of the question, to the extent that it is not a matter of policy, of the legal requirement of approval of the Secretary of the Interior of various matters involving Indian affairs and facilitating approval procedure or dispensing with approval.

The committee membership this year has consisted of Charles F. Luce, Walla Walla, Washington, Vice-Chairman, Cedor B. Aronow, Shelby, Montana, Vice-Chairman and Charles J. Alexander, Washington, D. C., Ralph A. Barney, Chief, Indian Claims Section, Lands Division, Department of Justice, Washington, D. C., S. A. Burnley, Louisville, Kentucky, Laurence Davis, Phoenix, Arizona, James H. Graven, Greene, Iowa, George P. Haley, Portland, Oregon, Donald C. Hirsch, Indianapolis, Indiana, Jay H. Hoag, Duluth, Minnesota, H. E. Hyden, Associate Solicitor, Indians, Department of the Interior, Washington, D. C., Frederic L. Kirgis, Denver, Colorado, Arthur Lazarus, Jr., Washington, D. C., John Rogers, Tulsa, Oklahoma, Marvin J. Sonosky, Washington, D. C., Harold Vogel, New York City, New York, Richard R. Wilkins, Washington, D. C., Charles H. Woods, Tuscon, Arizona. The committee has represented divergent points of view and has a good geographical distribution. The cooperation and assistance of the members of the committee during this year has been appreciated.

ROBERT W. BARKER, *Chairman*

REPORT OF THE COMMITTEE ON THE INTERSTATE COMMERCE ACT

During the course of the year the members of this committee gave their consideration to three legislative proposals, one of which was reflected in a legislative recommendation made to the Congress by the Interstate Commerce Commission (in its 73d Annual Report for the fiscal year ended June 30, 1959) and the other two of which were reflected in bills introduced in the Congress:

Legislative Recommendation of the ICC

The ICC recommended that section 17 of the Interstate Commerce Act be amended in such a way as to authorize the Commission to delegate to 3-man employee boards the power to make decisions in cases in which a hearing has been held and which do not involve issues of general transportation importance, with right of appeal to an appellate division whose decision would be administratively final.

The response to a request for expressions of views from members of the committee on this subject was not very great; but those who did respond were about equally divided as to desirability, or merits, of the proposal.

It is not recommended that the Section of Administrative Law take any position in respect of the matter.

H.R. 11411 (86th Congress)

On March 28, 1960, Congressman Moulder of Missouri introduced the above-captioned measure that would amend the Legislative Reorganization Act of 1946 in such a way as to make provision for the review (by committees of Congress) of Federal administrative agencies' proposed rules and regulations prior to their effectiveness.

Of those members of the committee who responded to a request for their views on this bill (and on the principle therein embodied) a very substantial majority signified their oppositon.

It is recommended that the Section of Administrative Law take appropriate action expressing opposition to the proposal incorporated in H.R. 11411.

S. 3596 (86TH CONGRESS)

On May 26, 1960, Senator Case of New Jersey introduced the above-captioned bill for himself, and Senators Javits and Keating of New York. The bill, denominated the "Department of Transportation Act of 1960," calls for the establishment of an executive department of the Federal government to be known as the United States Department of Transportation. It is similar in some respects to H.R. 985 (86th Congress), "to create a Department of Transportation and Communications, and to prescribe its functions," that received consideration at the hands of the committee last year (see Administrative Law Bulletin, Volume 11—Spring-Summer, 1959, page 321).

Those responding to a canvass of the committee this year for their views on S. 3596 voted approximtaely two to one in opposition thereto.

It is not recommended that the Section of Administrative Law take any action in connection with this matter.

HARRY J. BREITHAUPT, *Chairman*

REPORT OF THE COMMITTEE ON LABOR

The following report was prepared by a subcommittee of the Labor Committee, headed by Donald Montgomery and composed of the following additional persons:

Frederic D. Anderson
Jack Binion
Theo Hamilton
Thomas M. Hyndman
Arthur M. Marshall
Edward J. Masek
Albert K. Plone
Gilford G. Rowland
Robert M. Segal

In preparing this report the subcommittee has sought diligently to avoid duplicating the efforts of the Labor Relations Law Section which for a considerable period of time has been engaged in an extensive study of NLRB procedures. Theerfore we have confined ourselves to reporting on:

(1) Status of changes in Board procedure authorized by the Landrum-Griffin Act but not yet effectuated by the NLRB.

(2) Views and criticisms expressed by attorneys for labor unions, attorneys for management and Board personnel on changes in procedure already put into effect.

By seeking the comments from representatives of union groups, management groups and Board personnel, the subcommittee sought to learn whether any of the changes in procedure have proved discriminatory in application.

(1) The authorization in Section 701(b) for the Board to delegate to regional directors certain powers in representation proceedings previously exercised exclusively by the Board.

(2) Advisory opinions from the Board on jurisdiction where a state court action is pending.

(3) Elections under 8(b)(7).

(4) New regulations describing the conditions under which economic strikers will be permitted to vote.

Delegation of Authority

Delegation of authority by the Board to regional directors, which was specifically authorized by the Landrum-Griffin Act, has not yet been put into effect by the Board. The Board has requested comments, suggestions, and proposals from interested per-

sons on the extent to which the Board's authority over representation proceedings should be delegated. It seems premature for the subcommittee to make comment until the views of interested persons have been sifted and analyzed by the Board and some action taken.

Advisory Opinions

Section 701 of the Landrum-Griffin Act authorized state courts and administrative bodies to provide a remedy in labor disputes wherein the NLRB would decline to act. The purpose of this provision was partially to offset the effect of the U.S. Supreme Court decision in *Guss* v. *Utah Board* and similar cases. To prevent delays in state proceedings, the NLRB has announced that it will render advisory opinions on jurisdiction only where a state action is pending. It has been urged by some practitioners that the Board render advisory opinions at the request of any person who has a legitimate interest, whether or not a state action is pending. This would permit unions and employers, outside of the Board jurisdiction, to plan future action with full knowledge of their status with respect to NLRB jurisdiction.

Still other practitioners feel that the Board should give advisory opinions as to whether certain fact situations constitute an unfair labor practice. Where the acts complained of do not constitute an unfair labor practice, federal power to provide a remedy may not be plenary and the plaintiff can, in many cases, sue in a state court for damages or some other form of remedy (*Russell* v. *UAW*). The Board feels, however, that it would place too great a burden upon it to render advisory opinions in all of the cases which would probably be presented if any person with a legitimate interest were permitted to apply. The subcommittee does not feel that limiting advisory opinions to cases where state action is pending is discriminatory.

Expedited Elections

Section 704(c) of the Landrum-Griffin Act amends Section 8(b) of the National Labor Relations Act, by adding a new subsection (7), providing for expedited elections in certain cases. These are referred to as 8(b)(7) elections.

Under this section an expedited election can be obtained if an employer is being picketed by a labor organization where a 9(c)

petition has not been filed within a reasonable period of time not to exceed 30 days from the commencement of such picketing. Regional directors are authorized to conduct elections without a prior hearing. The obvious purpose of Congress in enacting this language was to curtail the picketing privileges of unions. It is therefore understandable that many labor organizations object to any changes in NLRB procedure which were adopted to effectuate this section of the Act. However, the report of this subcommittee will limit itself to objections arising solely out of NLRB regulations and will not make comment or criticism of the statutory language.

Employer Representative Objections: Two general objections to 8(b)(7) elections were raised by attorneys representing employers. They were:

> (1) The regulations issued under 8(b)(7) permitting regional directors to hold elections prior to hearings. This deprives the employer of an opportunity to introduce evidence showing lack of Board jurisdiction or to raise any question concerning the appropriate bargaining unit.
>
> (2) Some employers object to the requirements of the regulations that any pending charge be dismissed before an 8(b)(7) election can be held. The picketing in question may have been the basis of a meritorious charge. However, this charge will be dismissed before the election will be held. If the union loses the election, the employer must file a new charge before he can introduce evidence to show that the picketing in question constitutes an unfair labor practice.

The only apparent reason for the requirement that the charge be dismissed before an 8(b)(7) election can be held is to bring the regulations into general conformity with those covering 9(c) elections. The Board will not conduct an election under 9(c) until disposition has been made of all charges.

Labor Complaints: Some labor organizations object to elections prior to a hearing because it deprives them of sufficient time to get a proper organizing campaign under way. Also, unions claim that the Board does not expedite elections on petitions filed by labor organizations.

Voting Status of Economic Strikers

Section 702 of the Landrum-Griffin Act gives the Board discretion to decide whether economic strikers shall be eligible to vote during a 12-month period after commencement of a strike. Under

this section, the Board has decided that both the economic striker and his permanent replacement will be permitted to vote in an election during the one-year period. The votes of both the striker and his replacement are subject to challenge. The Board will make a determination as to which has the right to vote only where the challenged ballots can determine the outcome of the election. In no case since the new regulations were issued has the Board had occasion to make a determination of this type. There are a number of objections to permitting both the economic strikers and their replacements to vote, subject to challenge. While the problem would not be serious where only a small percentage of the strikers have been permanently replaced, votes subject to challenge might decide the outcome of an election where a large number of strikers have been permanently replaced. To the party which is victorious except for challenged ballots, it could give advantages which could determine the outcome of the dispute. The Board's regulation governing the voting status of economic strikers is similar to the procedure prior to enactment of the Taft-Hartley Act. While there are objections to the regulations, they do not appear to be discriminatory.

Conclusion

Changes in NLRB procedure authorized or necessitated by the enactment of the Landrum-Griffin Act have not been in effect long enough to permit a determination to be made as to whether they may be discriminatory in their application to particular types of labor disputes. It appears to this subcommittee that the Board has acted in the best manner open to it in revising its procedures, although there may be some objection to the results produced. It is the subcommittee's recommendation that a study and report similar to this one be made after the new procedures have been in effect for one additional year.

The full committee has considered the foregoing report and concurs in its conclusions except that one member takes the position that the entire report is premature and another member believes the report should criticize the Board's failure to utilize the formal rule-making procedures of the Administrative Procedure Act, as authorized by Section 6 of the National Labor Relations Act, to define the voting rights of economic strikers.

Respectfully submitted,
Milton C. Denbo, *Chairman*

REPORT OF THE MARITIME TRANSPORTATION COMMITTEE

The initial subject considered by this Committee was the question of the desirability of legislation with respect to the ocean steamship conference contract rate system in view of the decision of the U.S. Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481 (1958). Of the members expressing their views the majority favored the position of the Federal Maritime Board that the dual contract rate system should be legalized. The Board has publicly supported such legislation as necessary to the preservation of stability of rates and services in ocean foreign commerce. One committee member was of the view that this matter was not a subject which should be considered by this Committee.

In any event, Public Law 85-626, 72 Stat. 574, with an expiration date of June 30, 1960, had been enacted following the *Isbrandtsen* decision, *supra.* This sought to validate, in principle at least, dual rate contract arrangements in use by members of our ocean steamship Conference on May 19, 1958—the date of the above decision. As of the date of this writing, H.R. 10840, designed to extend the "stop-gap" legislation for another year beyond the present expiration date, is before the Congress. There is every indication H.R. 10840 will be enacted into law in this Session.

The Committee also has considered H.R. 8388, whose purpose was described by the House Committee on Merchant Marine and Fisheries as ". . . to provide further requirements for applicants for and contractors under operating-differential subsidy contracts to correct certain deficiencies in existing law." Included were provisions for a public hearing before the Federal Maritime Board on specified issues pertaining to possible interest, direct or indirect, in foreign-flag vessels competing with American flag service determined to be essential. Public hearing also would be provided on the issue of whether special circumstances exist and good cause is shown to justify making the contract with the applicant, notwithstanding the existence of designated types of foreign-flag interest, relationship or activity. It now appears that no action will be taken on H.R. 8388 in the present Congress. While expressed opinion of this Committee's members was divided, a question was raised by some as to the necessity for the proposed legislation.

The final subject considered by the Maritime Transportation Committee was S.3596, introduced by Senator Case of New Jersey. It is designed to establish a U.S. Department of Transportation. Sections 7(a) and 7(b) of S. 3596 relate to transfer of the Federal Maritime Board and the Maritime Administration to a new Secretary of the Department of Transportation. The bill bears the date of May 26, 1960. As of this writing the majority of the members of this Committee reporting to the Chairman are opposed to the bill as unnecessary and unwarranted. Particular objection was registered against any encroachment upon or elimination of the independence of the Federal Maritime Board in its semi-judicial regulatory functions.

JOHN F. DONELAN, *Chairman*

REPORT OF THE MEMBERSHIP COMMITTEE

The work of the Membership Committee of the Section of Administrative Law has consisted of continuing efforts to obtain new members for the Section, and thereby to maintain the healthy growth the Section has had in recent years.

Direct mail to both new and old members of the American Bar Association has been utilized. Members of the Committee are purposely distributed geographically over the nation, so as to take advantage of individual committee members' knowledge as to which lawyers in their respective areas should be interested in the work of the Section.

Personal solicitation by the Committee regularly produces new members.

It is recommended that the same general plan of operation of the Membership Committee be continued.

MARK MARTIN, *Chairman*

REPORT OF THE NATIONAL COMMITTEE

Your Committee noted 136 bills introduced in the Second Session of the 86th Congress as worthy of perusal in the light of the duties of the Section. Of these 136 examined and considered, 53 were thought to contain provisions relevant enough to those duties to warrant study by one or more of the Section's committees.

Among the potentially significant bills were the following: (1) To give the Civil Aeronautics Board or a committee appointed by it authority to review and revoke or modify rules and regulations of the Federal Aviation Administrator; (2) to make the Federal Aviation Agency an adjunct of the Department of Defense in time of war or national emergency; (3) to forbid any limitation or revocation of airmen's certificates by the Federal Aviation Agency except after full hearing; (4) to foreclose judicial review of orders of the Civil Aeronautics Board refusing to consolidate applications for hearing until after final action on the applications; (5) to permit the Federal Communications Commission to order broadcast licensees to forfeit up to $1,000 a day to the United States upon its finding of wilful or repeated violations of the Communications Act; (6) to require hearing before any initial broadcast license is granted; (7) to enlarge the right to hearing and judicial review on orders excluding or deporting aliens and granting or withholding naturalization; (8) to authorize the Interstate Commerce Commission to "call upon" other agencies of the United States for advice in proceedings on applications by railroads to abandon passenger service; (9) to permit the Interstate Commerce Commission and the Federal Power Commission to delegate to boards of employees the making of decisions; (10) to create a department of Transportation and transfer to it the "promotional and administrative functions" of the administrative agencies regulating land, water and air transportation; (11) to give the Secretary of Commerce broad power to grant and revoke the licenses of pilots on the Great Lakes and St. Lawrence River and to regulate their rates, charges and conditions and terms of service; (12) to authorize judicial review in United States District Courts of administrative determinations as to the use of lands of the United States for grazing purposes; (13) to upgrade and secure the independence and tenure of hearing examiners; (14) to

revise the criminal and civil penalties relating to conflicts of interest in federal employees and to further define and enlarge the area of prohibited activity by them; (15) to reiterate and clarify the provisions of Section 3 of the Administrative Procedure Act requiring administrative agencies to publish descriptions of their organizations, rules, procedures and forms; (16) to require rules, regulations and orders of administrative agencies to be submitted to the Senate and the House before their issuance as effective, with the right in either body within 15 days to prevent their issuance as effective by disapproval by the Committee which considered the original act under which they are proposed; (17) to require the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Securities and Exchange Commission, the Federal Communications Commission, the Civil Aeronautics Board, and the Federal Aviation Administration, to assess upon and collect fees from all persons they investigate, all parties to proceedings before them, all persons filing reports or other papers with them, all persons receiving licenses from them, and all persons they have a duty to regulate and supervise, the fees to be fixed so as to "as nearly as may be practicable" recover the cost of the activity of the agency related to the matters in which the fees are assessed; (18) to give judge advocates and law specialists in the military departments incentive pay and temporary promotions; (19) to permit the Federal Trade Commission to issue judicially enforceable temporary cease and desist orders pending the completion of proceedings on complaints by it; (20) to give the United States District Courts jurisdiction in private civil suits to compel officers, employees and agencies of the United States to perform their duties, with venue laid in the district where the plaintiff resides, or where the cause of action arose or where any property involved is situated.

Further discussion of some of these bills is contained in the Reports of other Committees of the Section. Suffice it to say here that none of them has been enacted and, assuming any position the Section wants to take on them is approved by the House of Delegates by the conclusion of its mid-winter meeting in 1961, there will be ample opportunity to make it known to and have it considered by the Congress before it takes definite action on them. We say this on the assumption, generally shared, that the meeting of the Congress commencing in August of 1960 will be concerned

almost exclusively wtih grave and immediate substantive problems of basic foreign and domestic policy.

The principal activity of your Committee this past year has been in the field of legislation designed to strengthen the statutes defining, regulating, and forbidding improper, *ex parte* communication with, and conflicts of interest within, administrative agencies. Your Chairman accompanied Donald C. Beelar, Chairman of the Association's Special Committee on the Administrative Procedure Act, and Valentine B. Deale, its Vice-Chairman, when they testified before the Judiciary Committee of the House of Representatives. Mr. Beelar's testimony was in support of the conflict of interest provisions of H.R. 7092 (companion to S. 600, sponsored by our Bar Association) but more particularly directed to the provisions of H.R. 2157, and H.R. 10657 governing *ex parte* communications. Mr. Deale's testimony was directed primarily to the conflict of interest provisions in H.R. 2157. He compared them with the provisions of H.R. 7092 and strongly advocated that they be amended to square with the latter. Your Chairman confined his testimony to a showing of the history of these matters in the Administrative Law Section, our members' ardent interest in them, and the Section's approval of the principles espoused by Messrs. Beelar and Deale.

The most extensive legislative activity in the field of administrative law this past year has of course been the extended hearings held by the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4800 and H.R. 6774. Both of these bills, the latter being the one sponsored by our Association, are designed (the former among other things) to define improper *ex parte* contacts with administrative agencies and to prevent them. Mr. Beelar, in his capacity as Chairman of the Association's Special Committee on the Administrative Procedure Act, and your Chairman orally presented a prepared joint statement to the Committee in support of H.R. 6774, after which they were extensively cross-examined by the Committee members. Upon the conclusion of the hearings, which consumed 13 days, the Committee determined to make H.R. 6774 the basis of its report. Thereafter, upon request of the Chairman, Mr. Beelar and your Chairman, together with Mr. Deale, who testified for the Bar Association of the District of Columbia, spent three days with the staff of the Committee assisting it in re-drafting the bill in accord with the Committee's views of the shape it should finally take.

The text of the bill (now H.R. 12731) which emerged, with the Committee's suggested further amendments included in its favorable report to the House rendered on July 1, is attached as an Appendix hereto. The bill does not purport to cure all evils. For example it is limited to the six so-called major independent regulatory agencies. It does not deal with off-the-record communications between personnel of an agency, as distinguished from those between members or employees of an agency and others. It is perhaps defective in that it does not provide that an agency may make its prohibitions of *ex parte* communications applicable to proceedings not required by law to be determined on a hearing record, notwithstanding that such proceedings are often, in term of substance and legal consequences, more closely analagous to adjudication, licensing or rate regulation than to general rule making. Nevertheless, the enactment of H.R. 12731 would be a long step forward and, in the view of your Chairman, would largely achieve the objectives of the proposals of our Association in this matter.

Your Chairman, having had the pleasure of reading the reports of the other Committees of the Section, takes the liberty of commending them and the Committees' hard work and serious thought they reflect.

BRYCE REA, JR., *Chairman*

APPENDIX
TO
REPORT OF NATIONAL COMMITTEE

A BILL

To promote the efficient, fair, and independent operation of the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Independent Regulatory Agencies Act of 1960."

DEFINITIONS

SEC. 2. For the purposes of this Act—

(1) The term "agency" means the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Com-

mission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission, respectively.

(2) The term "agency employee involved in the decisional process" includes any employee of an agency who is subject to the immediate supervision of a member of the agency and any employee of an agency who is charged with the preparation of decisions with respect to proceedings before the agency.

(3) The term "on-the-record proceeding" means any proceeding before an agency in the case of which agency action is required by law or agency rule to be based on the record of an agency hearing, but such term includes such a proceeding only beginning with (A) the time that such proceeding has been noticed for hearing, or (B) such earlier time as the agency may designate as provided in section 6.

(4) The term "person" includes, in addition to any individual (whether or not in public life), corporation, company, firm, partnership, association, or society, any organized group of individuals and any governmental body or body politic.

(5) A communication with respect to a proceeding, or with respect to the consideration or decision of a proceeding, shall be considered to be "ex parte" if reasonable notice thereof is not given, in advance of such communication, to all interested parties; except that a request for information with respect to the status of a proceeding shall not be deemed to be an ex parte communication.

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby declares that it is vitally important in the public interest to strengthen the independence and effectiveness of regulatory agencies (as defined in section 2) and to promote the efficient, fair, and independent operation thereof, and, to this end, it is necessary to take action—

(1) to guard against the exertion of improper influence upon such agencies, and against improper conduct by members and employees of such agencies;

(2) to insure the observance of proper ethical standards by the members and employees of such agencies, by the parties, by persons acting for or on behalf of such parties, and by other persons;

(3) to prohibit improper "off-the-record" communications in proceedings in which agency action is required by law or agency rule to be based on the record of an agency hearing; and

(4) to clarify and make uniform the power of the President to remove members of such agencies for cause.

(b) The following provisions of this Act are intended to implement and make effective the policy declared in subsection (a).

IMPROPER INFLUENCE EXERTED BY PARTIES AND OTHERS; IMPROPER CONDUCT OF AGENCY MEMBERS AND EMPLOYEES

SEC. 4. (a) The Congress hereby recognizes that it is improper for any person, for himself or on behalf of any other person, to influence or attempt to influence any vote, decision, or other action by an agency or by any member or employee of such agency, in any proceeding or matter before the agency by the use of secret and devious methods calculated to achieve results by the exertion of pressures, by the spreading of false information, by the offering of pecuniary or other inducements, or by other unfair or unethical means, rather than by reliance upon a fair and open presentation of facts and arguments in accordance with established procedures.

(b) The Congress hereby recognizes that it is improper for any member or employee of an agency to—

(1) engage, directly or indirectly, in any business transaction or arrangement for profit with any person, or any representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform;

(2) accept or solicit any money, loan, service, employment, or thing of value from any person, or representative of any person, who has a pecuniary interest in any proceeding or matter before the agency and in connection with which the member or employee has any duty to perform;

(3) use for the personal profit of himself or others confidential information gained by reason of his official position or authority;

(4) fail to restrict his personal business affairs so as to avoid conflicts of interest with his official duties; or

(5) act in any official matter with respect to which there exists a personal interest incompatible with unbiased exercise of official judgment.

(c) For the purpose of carrying out in an effective manner the policy stated in section 3(a) of this Act, each agency shall prescribe regulations implementing and supplementing the provisions of subsections (a) and (b) of this section. In order to bring about compliance with such regulations, and in order to prevent acts, practices, and conduct which, by subsections (a) and (b) of this section, are declared to be improper, each agency shall, among

other things, establish procedures for considering and acting on complaints.

STATEMENTS TO BE INCLUDED IN HEARING NOTICES

SEC. 5. Every notice of hearing issued by an agency with respect to a proceeding shall contain a statement as follows:

(1) If such notice relates to an "on-the-record proceeding" (as defined in section 2 of this Act) it shall state that such proceeding is subject to section 7 of this Act.

(2) If such notice relates to any other type of proceeding, it shall state that the proceeding is not subject to section 7 of this Act.

If a notice of hearing with respect to any proceeding before an agency fails to comply with this section, such proceeding shall be deemed to be an "on-the-record proceeding" for the purposes of section 7.

AUTHORITY TO TREAT CERTAIN PROCEEDINGS AS "ON-THE-RECORD PROCEEDINGS" PRIOR TO BEING NOTICED FOR HEARING

SEC. 6. (a) Whenever an agency determines that the issues involved in any proceeding to which clause (A) of section 2(3) would apply are of such a nature as to make such action appropriate, it may designate a time, earlier than the time specified in such clause (A), when such proceeding shall begin to be an "on-the-record proceeding" for the purposes of this Act.

(b) When an agency takes the action authorized by subsection (a) of this section, such agency shall, in advance of the time designated by the exercise of such authority, give notice, in the same manner that notice of hearing would be given, that beginning with the time so designated such "on-the-record proceeding" shall be subject to the provisions of section 7 of this Act.

EX PARTE COMMUNICATIONS IN THE CASE OF "ON-THE-RECORD PROCEEDINGS"

SEC. 7. (a) In the case of any "on-the-record proceeding" before an agency, in order to satisfy the requirements of basic fairness in connection with such proceeding—

(1) except in circumstances authorized by law, no party to such proceeding, or person acting on behalf of such party, shall communicate ex parte (as defined in section 2(5) of this Act) with respect to such proceeding, directly or indirectly, with any agency member, hearing officer, or employee involved in the decisional process (as defined in section 2 of this Act); and

(2) except in circumstances authorized by law, no agency member, hearing officer, or employee involved in the decisional process shall communicate ex parte with respect to such proceeding, directly or indirectly, with any party to such proceeding or any person acting on behalf of such party.

(b) If any written ex parte communication is made to any agency member, hearing officer, or employee involved in the decisional process in violation of subsection (a) of this section, the recipient shall promptly deliver it to the Secretary of the agency together with a written statement of the circumstances of such communication. The Secretary shall promptly place the communication and statement in the public file of the agency and shall give notice of such communication to all parties to the proceeding with respect to which it was made.

(c) If any written ex parte communication is made by any agency member, hearing officer, or employee involved in the decisional process in violation of subsection (a) of this section to a party to an "on-the-record proceeding" before the agency or any person acting on behalf of such party, such member, officer, or employee, as the case may be, shall promptly deliver a copy of such communication to the Secretary of the agency together with a written statement of the circumstances of such communication. The Secretary shall promptly place the copy of the communication and the statement in the public file of the agency and shall give notice of such communication to all parties to the proceeding with respect to which it was made.

(d) A violation of paragraph (1) of subsection (a) of this section shall be good cause, in the agency's discretion, for disqualification of the party who made the ex parte communication, or on whose behalf the ex parte communication was made, in the "on-the-record proceeding" with respect to which the ex parte communication was made.

(e)(1) No ex parte communication made in violation of subsection (a) of this section shall be considered in the "on-the-record proceeding" with respect to which it was made unless it shall have been duly admitted in evidence in such proceeding.

(2) No document placed in the public file of an agency as required by this section shall be removed from such file, except for official purposes.

(f) Any person who willfully violates subsection (a), (b), (c), or (e) of this section shall be fined not more than $10,000 or imprisoned not more than one year, or both.

WRITTEN INQUIRIES WITH RESPECT TO THE STATUS OF "ON-THE-RECORD PROCEEDINGS"

SEC. 8. If any written request for information with respect to the status of an "on-the-record proceeding" before an agency is received by any member or employee of the agency, other than the Secretary of the agency, the recipient shall promptly deliver such request to the Secretary of the agency for an appropriate reply. The Secretary of the agency shall place such request in the public file of the agency, together with a copy of any reply thereto made by him in writing. Such Secretary shall also place in the public file of the agency every written request for information received by him directly with respect to the status of any "on-the-record proceeding," together with a copy of any reply thereto made by him in writing. No document placed in the public file of an agency as required by this section shall be removed from such file, except for official purposes.

REMOVAL OF AGENCY MEMBERS FOR CAUSE

SEC. 9. Notwithstanding any other provision of law, any member of an agency (as defined in section 2 of this Act) may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.

ADMINISTRATIVE PROCEDURE ACT

SEC. 10. (a) In the case of any "on-the-record proceeding" before an agency (as defined in section 2 of this Act), subsection (c) of section 5 of the Administrative Procedure Act (5 U.S.C. 1004 (c)) and the provisions of this Act shall apply as though the last sentence of such subsection (c) had not been enacted.

(b) This Act shall supersede and modify the provisions of the Administrative Procedure Act to the extent that this Act is inconsistent therewith.

AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934

SEC. 11. (a) The following provisions of the Communications Act of 1934 are hereby repealed:

(1) Subsection (c) of section 5 (47 U.S.C. 155(c)), which provides for a "review staff."

(2) Paragraph (2) of subsection (c) of section 409 (47 U.S.C. 409(c)(2)), which, in cases of adjudication, prohibits the making of "additional presentations" by certain agency personnel unless upon notice and opportunity for all parties to participate.

(b) Such subsection (c) of section 409 of the Communications Act of 1934 is further amended by redesignating paragraph (3) thereof as paragraph (2).

REPORT OF THE COMMITTEE ON NATURAL RESOURCES AND INTERIOR MATTERS

1. Summary of Developments

The activity of the Committee has centered on the Rules of Practice of the Department of the Interior pertaining to appeals on public land matters, and in particular on the rules providing for the following: a. Hearings within the discretion of the Director, Bureau of Land Management; b. Decisions by the Bureau of Land Management which may involve documents not available to the appealing party; and c. Dismissals on technical grounds.

A Committee meeting was held with the Solicitor of the Department, George W. Abbott, and members of his staff in January at which these and other matters, including the separation of functions within the Department, were discussed. The Department has begun a comprehensive study of the appeals system and the ways in which appeals are treated. Some changes in the structure of the Solicitor's office for the handling of appeals will soon be announced.

This report will summarize the discussions with the Solicitor, brief the present status of the above enumerated items and point to several cases of interest which arose during the year. No recommendations requiring Section action are made.

2. Problems with Specific Rules

a. *Discretionary hearings:*

Section 221.6 of the Rules of Practice (43 CFR 221.6) provides:

> *Hearings on appeals involving questions of fact.* Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to a Field Commissioner of the Bureau of Land Management for such a hearing. Such a request must be made in writing and filed with the Director within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Director, and the Director may, on his own motion, refer any case to a Field Commissioner for a hearing on an issue of fact. If a hearing is ordered, the Director will specify the issues upon which the hearing is to be held.

This provision first appeared in the general revision of the rules issued in May 1956. At that time the Committee had urged that the Department permit a hearing in every case on appeal in which a hearing might be requested, failing which the Department should provide discretionary authority to order hearings as might be appropriate. It is disappointing that this authority, which it was assumed would be liberally used, has been exercised only once to the Committee's knowledge (See Statistical Appendix to Ann. Rept. BLM, Fiscal Year 1959, Table 59, p. 113).

When the Committee was concerned with this question in 1955-56 the Department indicated that the volume of appeals to the Director made it impractical to allow a hearing as a matter of right in each case. This was an important factor in permitting hearings only at the discretion of the Director. The volume of appeals has increased, not lessened. In fiscal year 1958, 2,535 appeals were received, which then represented a new high. This was topped in fiscal year 1959 when some 4,819 appeals were received by the Director, on top of 2,272 appeals awaiting action. A total of 4,600 appeals were disposed of in 1,608 separate decisions. Some 426 cases were in turn appealed to the Secretary for an 89 per cent increase over 1958.

Even though this volume at the Director's level appears large, the number of appeals actually represent a very small percentage of the cases handled in the field. The total of all new cases listed by BLM for fiscal 1959 in the lands and minerals adjudications field was 130,266. If we disregard the "investigations" and "other tenure actions" classifications the total is still 116,321. Thus the appeals out of this volume in fiscal 1959 represented less than 4 per cent of the case load.

Your Committee continues of the opinion that a hearing on appeal if requested is the ideal goal. There appear to be a number of possibilities which would permit an approach to this goal and perhaps ultimate fulfillment of it. For example, hearings might be provided at the request of any appellant with the rules to provide for an appropriate sharing of costs, however, to obviate frivolous requests. A possibility which falls short of the goal but which would be an improvement over the present situation might lie in designating certain classes of cases as eligible for hearings such as contests arising out of mining claims now are. Another possibility might be a requirement that the Director act to grant or deny the request for hearing within a reasonable time, stating his reasons

where the request is denied, his action in this regard being appealable to the Secretary prior to consideration on the merits by the Director.

b. *Decisions which may involve documents not available to the appellant:*

Section 221.99(d) of the Rules of Practice provides:

> "In any case, no decision on appeal or in a contest shall be based upon any record, statement, file or similar document which is not open to inspection by the parties to the appeal or contest."

This salutary rule is considered frustrated by the practice of the Bureau of Land Management in maintaining confidential files which a party is not at liberty to inspect. Even though the rule may be honored in all respects, an aggrieved party will never be satisfied unless permitted to inspect the full file. Although it has been understood in the past that this rule had been construed by BLM to be applicable only upon appeals to the Secretary, the Committee has recently been assured that the rule applies to an appeal at any level.

BLM has considered it essential to maintain reports from its field representatives confidential in order to get a full and free expression on the matters covered in the report. Therefore it forbids access to all or part of such reports. This makes it particularly difficult in connection with the framing of an appeal when frequently the grounds for denying an application in the first instance are contained in such a report. Although it is gratifying to be informed that the rule applies to appeals to the Director as well as to the Secretary it is believed that abolishing the "confidential" report or communication would permit a sharpening of the issues or, in some instances, cause a party to forego an appeal upon seeing a report laying out facts which the appellant may recognize as correct and which dispose of the case.

c. *Dismissals on technical grounds:*

These dismissals center on those rules which provide for the filing of the notice of appeal, filing of a statement of reasons for the appeal, service of copies of the notice and statement on any adverse parties, and payment of a filing fee.

The rules on these matters in connection with appeals to the Director of the Bureau of Land Management are as follows:

§ 221.2 *Appeal; how taken, filing fee, mandatory time limit.* (a) A person who wishes to appeal to the Director must file in the office of the officer who made the decision (not the office of the Director) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

(b) Except where an agency of the Federal Government or of a State or territorial government or political subdivision thereof or a municipal corporation is the appellant, a filing fee of $5 must be paid for each separate application, claim, entry, permit, lease, protest, or similar filing or interest on which the appellant is seeking favorable action. The consolidation of appeals will not relieve each appellant of paying the same filing fee that he would have to pay if he took his appeal separately. The filing fee should accompany the notice of appeal but in any event must be received in the office where the notice of appeal is required to be filed within the time allowed for filing the notice of appeal.

(c) No extension of time will be granted for filing the notice of appeal or paying the filing fee. If a notice of appeal is filed or the filing fee is paid after the grace period provided in § 221.92, the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. If the notice of appeal is filed or the filing fee is paid during the grace period provided in § 221.92 and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the case will be closed by the Director.

§ 221.3 *Statement of reasons, written arguments; briefs.* If the notice of appeal did not include a statement of the reasons for the appeal, such a statement must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D. C.) within 30 days after the notice of appeal was filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal as provided in § 221.98, unless the delay in filing is waived as provided in § 221.92. In any case the appellant will be permitted to file in such office additional statements of reasons and written arguments or briefs within the 30-day period after he filed the notice of appeal.

§ 221.4 *Service of notice of appeal and of other documents.* The

> appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments or briefs on each adverse party named in the decision appealed from, in the manner prescribed in § 221.95, not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 221.98. Proof of such service as required by § 221.95 must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D. C.) within 15 days after service unless filed with the notice of appeal.

It will be observed that under Sec. 221.2(a) the notice must be filed with the office which made the decision being appealed from, not with the Director; and the filing fee (Sec. 221.2(b)) must go to the same office. The statement of reasons, however, must be filed with the Director (Sec. 221.3). Proof of service, if offered at the time a notice is filed, must be filed with the office one is appealing from; otherwise it is filed with the Director (Sec. 221.4; 221.95). Proof of service, of course, must await actual service which must occur within 15 days after the filing of both the notice and the statement.

If a party appeals to the Secretary from an adverse decision by the Director, similar rules apply. Thus, under Sec. 221.32, he must file a notice of appeal with the Director, not with the Secretary. If his notice does not include a statement of reasons, such a statement must be filed with the Secretary, not with the Director, in 30 days after the notice is filed (Sec. 221.33). Once again a filing fee is required, this to be paid to the Director within the time allowed for filing a notice of appeal. Finally, each adverse party must be served within 15 days of filing and proof thereof filed with the Secretary unless it is tendered when the notice of appeal is filed, in which case it is filed with the Director.

Merely the statement of these requirements is confusing and it is understandable that so many appellants have fallen afoul of them. In partial recognition of the problem the Department in 1958 provided for a grace period, as follows:

> § 221.92 *Filing of documents.* (a) A document is filed in the office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it.
>
> (b) Whenever a document is required under this part to be filed within a certain time and it is not received in the proper

office, as provided in paragraph (a) of this section, during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal or contest in connection with which the document is required to be filed. This paragraph does not apply to requests for postponement of hearings under §§ 221.13 and 221.71 and requests for relief from reporter's fees under § 221.75.

As noted in the Committee's report last year (11 Ad. Law. Bull. 329, 334-36) the grace period does not seem to have cured the situation. For the fiscal year 1960 (July 1959-June 1960) the following cases were noted, all decided on appeal to the Secretary, to have been dismissed under these rules as to filing and service:

1. Failure to file timely notice of appeal or statement of reasons:

U.S. v. *Labbe,* A-28064, July 16, 1959; *Douglas Robert Wright, et al.,* A-27991, July 17, 1959; *Norman B. Wolford,* A-28129, July 28, 1959; *James M. Smith,* A-28084, Aug. 17, 1959; *Malcolm C. Petrie,* A-28117, Aug. 17, 1959; *Paul E. Brand,* A-28079, Oct. 15, 1959; *J. S. Thompson,* A-28098, Oct. 29, 1959; *Harry A. Hall,* A-28186, Oct. 30, 1959; *Harly S. Harty,* A-28247, Nov. 13, 1959; *Clifford Sanderson,* A-28122, Nov. 23, 1959; *Francis J. Burns,* A-28257, Dec. 1, 1959; *Jean Morcom,* A-28242, Dec. 22, 1959; *W. I. Cameron,* A-28273, Jan. 15, 1960; *James B. Temple, et al,* A-28285, Jan. 20, 1960; *Vera S. Caldwell,* A-28282, Feb. 19, 1960; *U.S.* v. *Haugen,* A-28339, Feb. 29, 1960; *Emil J. Nagler, Jr.,* A-28280, Feb. 29, 1960; *Cary M. Maguire,* A-28211, Mar. 7, 1960; *Arthur M. Moylan, Jr.,* A-28237, Mar. 29, 1960; *Freida B. Anson,* A-28343, Apr. 11, 1960; *Caroline L. Houser,* A-28264, Apr. 26, 1960; *Myrtle MacKinstry,* A-28366, May 3, 1960; *Merwin Liss,* A-28346, May 11, 1960; *Ethel V. Chapman,* A-28421, May 17, 1960; *Effie A. Sherman,* A-28385, May 23, 1960; *Malcolm C. Petrie,* A-28229, May 25, 1960; *H. Preston Porter,* A-28401, June 15, 1960; *L. E. Grammer,* A-28426, June 20, 1960; *Earl E. Hartley,* A-28413, June 20, 1960; *Keith J. Davidson,* A-28418, June 20, 1960.

2. Failure to serve adverse party:

Lawrence E. Steere, A-28074, July 16, 1959; *U.S.* v. *Boyd,* A-28086, July 17, 1959; *Paul Jungert,* A-28091, Aug. 21, 1959; *Ernest Bowen,* A-28161, Oct. 21, 1959; *William Dittman,* A-28097, Oct. 30, 1959; *William D. Colburn,* A-28235, Nov. 13, 1959; *Lee D.*

Larsen, A-28112, Dec. 30, 1959; *James P. Corbin,* A-28152, Jan. 14, 1960; *Norman C. Winchester,* A-28268, Jan. 19, 1960; *Maria T. Pastor,* A-28333, Feb. 18, 1960; *Edith H. Payne,* A-28155, Feb. 29, 1960; *John J. Smith,* A-28375, May 3, 1960; *Waldo E. Coyle,* A-28439, May 4, 1960; *U.S.* v. *Alaska Empire Gold Mining Co.,* A-28419, May 11, 1960; *Joseph M. Pentolino,* A-28283, June 1, 1960; *John L. Holyoak,* A-28453, June 22, 1960; *Frank J. and Marion Furginson,* A-28424, June 23, 1960.

The action in the *Colburn* and *Payne* cases seems to have been supertechnical. Both involved failure to serve notice of appeal on adverse parties. In *Colburn* the adverse party had received the statement of reasons for the appeal but the case was dismissed because the notice itself had somehow not been served. And in *Payne* the adverse party which had not been served was the Bureau of Indian Affairs, a companion bureau with the Bureau of Land Management, both part of and housed within the Department of Interior in Washington.

One way in which prospective appellants might be assisted would be for the officer issuing the decision to mark on the copy of the rules of practice customarily enclosed, just which set of rules of service the appellant must observe. It must be borne in mind that the appellants frequently do not have legal counsel. A reading of some of the cases makes it obvious that some of these people do not understand what their rights and obligations under the rules are.

Another possibility for consideration would be the recasting of the rules to eliminate the separate filing of a notice and statement of reasons by requiring the filing of a documented notice of appeal within 45 to 60 days with the officer being asked to take corrective action, this time being subject to extension for cause.

3. Separation of Functions

The Solicitor is the chief legal officer of the Interior Department. As such he renders legal advice to the Secretariat and to all bureaus or agencies of the Department; and also acts for the Secretary in disposing of appeals made to the Secretary from actions taken within the subordinate bureaus and agencies. This dual capacity of legal advisor and appellate judge was questioned when the Committee met with the Solicitor in January.

The Solicitor indicated a full appreciation of this problem and explained the compartmentalization within his office in the effort

to maintain a separation between the advocacy and adjudication responsibilities. For example, if the Division of Public Lands in his office renders advice to the Bureau of Land Management on a matter which ultimately arrives at the Solicitor's office in the form of an appeal, the Branch of Land Appeals writes a decision completely independent of the Division of Public Lands.

The existing situation in connection with separation of functions is expected to be sharpened through administrative changes in the Solicitor's office expected to be made in the near future. A Deputy Solicitor for Appeals will be named whose sole responsibility will be the handling of appeals to the Secretary from decisions in the constituent bureaus. Under him will be an Appeals Division which will handle the functions now served by the Branch of Lands Appeals, the Branch of Indian Appeals, and the Branch of Claims and Contract Appeals, including the Board of Contract Appeals. The benefits to the Department of this new structure would appear to be several such as greater flexibility with personnel engaged in appeals work, a uniform docket, uniform reporting and indexing of case results, uniform rules on all appeals, closer control on the handling of inquiries and *ex parte* communications, and economy in the cost of administration. The public should benefit through the creation of a position in which the only responsibility is adjudication for all appeals directed to the Secretary and in a streamlining and speeding of the appeals process. It is to be hoped, however, that these gains will not see any losses in sound administrative practice.

For example, it was through the Board of Contract Appeals, which was established in December 1954, that the procedures closest to those generally fostered by the Administrative Law Section were established, but for contract problems alone. Under Board procedures, hearings may be held on questions of fact at which the Department is represented by counsel. Whether a hearing is held or not, in response to an appellant's claims Department counsel must file a statement of the Government's position and a brief, to which the appellant may reply. It is expected that the Board and its procedures will not be lost in the administrative changes expected to be implemented. As a future goal it is hoped that similar procedures will be established across the board for all appeals. It is understood that when the Deputy Solicitor for Appeals is installed that part of his responsibilities will be a continuing review of the appeals process and the implementation of

changes which appear desirable. It is suggested that the Committee continue to work with the Solicitor and the new Deputy Solicitor toward this end. As a point of focus, the three situations noted earlier in the report under the existing rules should be given early attention.

4. Decisions of Interest in Connection with Administrative Procedure

1. *By the Department*

Two cases decided by the Department noteworthy in view of the discretionary authority of the Director, BLM to hold a hearing, are *J. D. Critchlow, et al.* A-27907, decided August 4, 1959, and *Max J. Curtis* A-27843, decided August 11, 1959.

The *Critchlow* case involved applications for private exchanges for certain public lands in Utah then being used for grazing purposes. Critchlow and others appealed the granting of the exchanges for the reason that they would remove from public use lands necessary as a route for transferring cattle from summer to winter ranges. The exchanges had been allowed by the Bureau of Land Management because the public lands were relatively isolated and constituted a unit which could not be administered economically by BLM. Critchlow's appeal to the Secretary argued for a hearing under the APA claiming some "fusion" among the Departmental officials. The Secretary ruled there was no statutory requirement for a hearing in connection with exchanges, and accordingly the Departmental determination did not fall within the scope of the APA, thus upholding the BLM decision. It would seem that the holding of a discretionary hearing in this case at the Director's level might have obviated the appeal to the Secretary as it appeared ultimately that there were two alternative stock routes which, although somewhat removed, were apparently available to Critchlow.

The *Curtis* case involved a homestead application on 160 acres in Utah which was denied by the Bureau of Land Management on the basis of an examination which determined that the lands involved were unsuitable for crop production. In appealing Curtis presented several affidavits of local farmers indicating that the lands could be irrigated economically. The Secretary held that in view of this evidence the decision below should be set aside and the case remanded to the Director for further consideration. The

Secretary found further, however, that Curtis' contention that he was entitled as a matter of legal right to a hearing in connection with the classification of the land was incorrect. Such classification, the decision holds, is discretionary with the Secretary and there is no requirement of law that a determination be based upon a record compiled at a hearing. *Wyoming ex. rel. Winnie Wintermote* v. *McKay* (No. 2431-55, D.C.D.C., Dec. 7, 1955). Notwithstanding this, however, the Secretary's opinion notes that Curtis should be permitted to submit additional evidence and, if a further field examination is made, to accompany the examiner and be given the opportunity to discuss the case with appropriate officials of the local BLM offices. There is, in short, provision for a rump hearing without, however, taking advantage of the discretionary hearing authority held by the Director of BLM. It might be added that affidavits which conflict with the findings of the local Land Offices are not uncommon. In the absence of a hearing, the affidavit route is the only evidentiary channel open to an applicant. In the *Curtis* case the affidavits happened to come to the attention of the Secretary and were found believable by him.

2. *By the Courts*

Our report last year noted *Adams* v. *Witmer and Berriman* (No. 15859, 9th Cir., Dec. 10, 1958) in which the Circuit had remanded for further consideration Adams' application for an injunction and then withheld action when the Government, in application for rehearing *en banc,* contended that mandatory affirmative relief was involved which could be afforded only by the Secretary of Interior, an indispensable party. The Court ordered Adams to file a brief, following which the Court, in a per curiam opinion left its opinion of December 8, 1958, intact and denied the petition for rehearing. *Adams* v. *Witmer and Berriman* 271 F. 2d 29 (9th Cir. 1958, reh. denied Sept. 28, 1959).

The per curiam opinion disposes of what it calls the Government's assertion that the BLM and Secretarial orders cancelling Adams' mineral entries were not subject to judicial review by finding that the APA was enacted to bring "the decision of controversies . . . back into the judicial system" (citing Davis, Administrative Law Treatise (1958) Vol. 1, § 1.04, p. 26). In connection with the contention that the Adams' action could not be maintained because it sought "mandatory affirmative relief," the

Court found that the prayer that Berriman (the Forest Service Ranger who had ordered Adams to get off his mining claim and remove his buildings) be enjoined from disturbing Adams was a "negative" form of relief. In addition, the court pointed to Sections 10(b) and 10(e) of the APA, the first of which provides for review through "any applicable form of legal action (including actions for declaratory judgments or writ of prohibition or *mandatory* injunction)" and the latter of which provides that the reviewing court shall "compel agency action unlawfully withheld."

The Court noted, however, that when the petition for rehearing was filed the Government moved to dismiss as to Witmer (BLM Land Office manager) for the reason Witmer had retired and no motion to substitute his successor had been made. The Court found the action as against Witmer had abated and accordingly granted the motion to dismiss as to him but saw no reason why this should affect the continued prosecution of the case as against Berriman.

In this situation the Government elected not to seek review of the case in the Supreme Court and filed an action against Adams to remove him from his mining claim. This case was consolidated with the case on remand from the Circuit and further action is now pending.

Another recent case of interest for rulings on several questions of Interior Department procedure is *Foster* v. *Seaton,* 271 F. 2d 836 (D.C. Cir. 1959), as follows:

a. In a proceeding instituted by the Department to contest mining claims based on sand and gravel deposits in the Las Vegas area, it was not error to permit the intervention of claimants under the Small Tract Act after a decision favorable to the mining claimant had been rendered by a hearing officer, even though the intervention resulted in a reversal of the initial decision by the Director of the Bureau of Land Management which was upheld on appeal to the Secretary. The Court found the small tract claimants to be interested parties and accordingly saw no basis for disturbing the administrative action permitting their intervention.

b. Although the hearing officer at first upheld a claim of privilege for a Government witness when the mining claimants asked to examine a confidential document from which the witness was testifying, the hearing officer later indicated he would reverse himself if the motion to examine the document were again made.

The motion was not reput and the Court found this point not available any further on appeal.

c. Even though the Government initiated the contest the burden of proof that there was no valid mining claim was not on the Government. The Government need only put out sufficient evidence to establish a *prima facie* case following which the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

d. Although the statute simply requires that a mineral deposit must be shown to be "valuable," past administrative construction of this in connection with widespread non-metallic minerals requires a showing of present value and not simply prospective market value. The Court found no basis for upsetting the Secretary's ruling on this, particularly in this case where expert testimony indicated that almost all of Las Vegas valley is composed of sand and gravel of similar quality.

e. The Secretary's finding was supported by substantial evidence on the record as a whole. Even though there may have been substantial evidence the other way, the Court does not weigh the evidence. The testimony offered by the Government was substantial, clear, and convincing.

ROBERT L. MCCARTY, *Chairman*

REPORT OF THE NOMINATING COMMITTEE

Your nominating committee nominates the following members of the Section for the offices indicated to be filled by election at the Annual Meeting, 1960.

For Chairman: Whitney R. Harris of Dallas, Texas.
For Vice-Chairman: Raoul Berger of Washington, D. C.
For Secretary: Elizabeth C. Smith of Washington, D. C.
For Delegate to the House of Delegates: Donald C. Beelar of Washington, D. C.
For Council Members (three year terms, each):
John B. Gage of Kansas City, Missouri.
J. Earl Cox of Washington, D. C.
Mark Martin of Dallas, Texas.
Jesse E. Baskette of Washington, D. C.

Statement of Applicable Provisions of By-Laws of the Section and Discussion

Article III, Section 3 of the By-Laws of the Section provides that

"A year shall be deemed to commence at the close of the Annual Meeting of the American Bar Association and to end at the close of the next Annual Meeting. The Chairman, Vice-Chairman and Secretary shall be nominated and elected each year in the manner hereinafter provided, and shall hold office for a term of one year. The Section Delegate shall be nominated and elected each even-numbered calendar year and shall hold office for a term of two years."

Article II, Section 4, provides:

"At each annual meeting four members of the Council shall be nominated and elected for terms of three years; in addition, there shall be nominated and elected a Council member to fill each existing vacancy who shall serve during the remainder of the term of such vacant position."

Article III, Section 5, provides:

"No person shall be eligible for nomination or election as an officer, Section Delegate, or a member of the Council unless he shall have been a member of the Section throughout the year in which the election is held. No member of the Council who is serv-

ing as an elected member and has served as such continuously for a period of three years shall be eligible for reelection as a member of the Council."

All of the persons herein nominated for Section Officers and Council Members have been Section members throughout the year in which this election is held and are otherwise eligible under the requirements of Article III, Section 5 of the By-Laws of the Section. Members of the Council whose terms expired this year are: William I. Denning of Washington, D. C., Frank C. Newman of California, Counts Johnson of Florida and J. Earl Cox of Alexandria, Virginia.

Messers Denning and Newman served three-year terms and consequently are not now eligible for re-election to the Council. J. Earl Cox was elected by mail vote following the 1959 Annual Meeting, to fill the vacancy created by the resignation of Whitney R. Harris after the latter was elected Vice-Chairman of the Section. This vacancy was for a term which expires this year. Counts Johnson was elected at the 1959 Annual Meeting to fill a vacancy then existing for a term which expires this year.

Attention is invited to Article IV, Section 1 of the By-Laws, which provides in pertinent part, that this Report shall be published prior to the Annual Meeting, and that at the commencement of the first session of the Annual Meeting, the Section Chairman shall orally announce the Report of the Nominating Committee, and after a reasonable interval to be then announced by the Chairman, before the conclusion of that session, additional nominations for any specified position may be made from the floor. Seconds to such nominations shall not be permitted, but the nominator must briefly identify the nominee and make a brief statement of his activities in the Section and in the law profession generally. This Section of Article IV of the By-Laws also provides that the Chairman shall announce the time and place when the election shall be held. Section 2 of Article IV provides that all such elections must be held at the last session of the Annual Meeting. Elections for contested positions must be by written ballot unless otherwise ordered by unanimous consent of all members of the Section present. Each position to be filled by election must be voted upon separately and election shall be by majority of the votes cast. A run-off election must be held to choose between the two leading candidates if a majority vote is not initially obtained.

Statement in Brief of Activities of Each Nominee

In accordance with Article IV of the By-Laws, there is set forth below a brief statement of the activities of each nominee proposed by the Nominating Committee, in the Section and in the law profession generally:

Whitney R. Harris

Mr. Harris is currently serving the Section as Vice-Chairman. He has been a member of the Council having been elected to this office at the 1957 Annual Meeting in New York, and he served as such until the 1959 meeting when he resigned after having been elected Vice-Chairman. He is a past executive director of the American Bar Association and for several years has been an active member of the Section. He is a member of the Bar of both California and Texas, is a Solicitor for Texas for Southwestern Bell Telephone Company, and is a member of the firm of Gossett, Harris, Denman and Hall of Dallas, Texas.

Raoul Berger

Mr. Berger is currently serving as a member of the Council, having been elected to a three-year term at the 1959 meeting. He has served as Chairman of the Committee on Agency Rulemaking and on a number of other important Committees of the Section. He is engaged in the practice of the law in Washington, D. C. and is a member of the Bar of both Illinois and the District of Columbia.

Elizabeth C. Smith

Miss Smith is currently serving the Section as its Secretary and has served as such since the 1956 Annual Meeting. She has been a member of the Section for many years, is a member of the Bar of Oklahoma, and is and for the past thirteen years has been, a Hearing Examiner with the Federal Communications Commission.

Donald C. Beelar

Mr. Beelar is a past Chairman of the Section, served ex-officio as a Member of the Council following his Chairmanship, and has served in the past on a number of important Committees of the Section. He has been a Member of the Section for many years. He is a member of the Bar of the District of Columbia, and is a member of the firm of Kirkland, Ellis, Hodson, Chaffetz and Masters of Washington, D. C.

John B. Gage

Mr. Gage is a past Chairman of the Section, served ex-officio as a member of the Council last year, and has served in the past on a number of important Committees of the Section. He is a member of the Bar of Missouri and is a member of the firm of Gage, Hodges, Moore, Kirkland, Park and Kreamer of Kansas City, Missouri.

J. Earl Cox

Mr. Cox has served during the current year on the Council of the Section, having been elected by mail vote following the 1959 Annual Meeting, to fill the unexpired term of Whitney R. Harris. He served as Vice-Chairman of the Hearing Examiner Committee of the Section and has been active in Section matters for many years. He is a member of the Bar of Ohio and is a Hearing Examiner for the Federal Trade Commission.

Mark Martin

Mr. Martin has served as Chairman of the Membership Committee of the Section for the past two years. He is a member of the Bar of the State of Texas, and is a member of the firm of Strasburger, Price, Kelton, Miller and Martin, of Dallas, Texas.

Jesse E. Baskette

Mr. Baskette has served as Chairman of the Committee on Hearing Examiners of the Section for the current year. He has also served as Vice-Chairman of the Committee on Agriculture and the Committee on Food and Agriculture of the Section. He is a member of the Bar of both the District of Columbia and the State of Tennessee and is a member of the firm of Cummings, Sellers, with at a later date."

Respectfully submitted,

CHARLES E. LONG, JR.
RICHARD S. DOYLE
FANNY N. LITVIN (*Chairman*)

Nominating Committee

COMMITTEE ON ORGANIZATION AND BY-LAWS

The Committee on Organization and By-laws has no recommendations to make to the Council and the Section as to any changes in the By-laws of the Section.

The Committee presented to the Council at the Mid-year meeting two matters relating to the operation of the Committee on Organization and By-laws. The matters were: (1) the Study of Committee Functions and Report; and, (2) Report to the Committee on Organization and By-laws of Establishing and Abolishing Committees. Though no formal action was required on either matter, the Council considered the first which related to the problem of an overlapping of functions of the Committee on Committees and the Committee on Organization by By-laws. The Council took action limiting the jurisdiction of the Committee on Committees to selection of membership, and decided that the duty of making a study of the structure and jurisdiction of the committees of the Section and reporting to the Council should rest with the Committee on Organization and By-laws.

The Committee plans to complete a current list of Committees of the Section and a statement of their functions by the date of the Annual Meeting.

LOUISA WILSON, *Chairman*

REPORT OF THE COMMITTEE ON POSTAL MATTERS

The Interim Report of the Postal Subcommittee recommended that the Section oppose the enactment by the 86th Congress of H.R. 7379 (which had passed the House during the first session), a bill to extend to lotteries and frauds the ex parte, preemptory, impounding power which the Postmaster General now possesses respecting obscene matter. At the midyear meeting of the council, it was pointed out that positions previously taken by the House of Delegates and Board of Governors authorized opposition to the bill without further action of the Association.

However, H.R. 7379 has remained on the calendar of the Senate Post Office and Civil Service Committee in a "Pending: No action scheduled" status until the date of this report, and the bill now appears dead for this session of Congress.

Respecting a host of bills seeking to define new crimes through use of the mails, such as S. 125 (to prohibit the remittance of money in connection with mayhem, assault, arson, etc.) and S. 121 (to prevent mailing of threatening communications to interfere with the execution of federal statutes or court decrees), the Interim Report of the Subcommittee recommended that such legislation be referred to the Criminal Law Committee and that a joint study with the Criminal Law Committee be authorized looking toward the adoption of a policy by the Association respecting the unwarranted use and abuse of the postal statutes to create spurious federal postal crimes out of purely local criminal acts.

In the recent case of *Parr* v. *United States,* the Supreme Court had occasion to point out that the postal statutes were never designed to embrace all local crimes through purely incidental and collateral use of the mails.

At the midyear meeting, Chairman Kintner directed Mr. McGovern to initiate joint discussions with the Criminal Law Committee. Preliminary discussions with Rufus King, Esq., Chairman of the Criminal Law Committee, indicate an interest in progressing such joint action by the two committees. It is recommended that these preliminary overtures be progressed and formalized during the coming term.

William L. McGovern, *Chairman*

REPORT OF THE PUBLIC CONTRACTS COMMITTEE

The Public Contracts Committee met throughout the year on the second Friday of each month, at the office of its Chairman, Gilbert A. Cuneo, 1625 K Street, N. W., Washington, D. C. At those meetings when the Chairman could not be present, Vice-Chairman Frederick Sass, Jr., presided.

The Committee was originally composed of 47 members but, in the course of the year, upon request, the membership finally grew to 64. The average attendance at the monthly meetings was 25.

The Committee meetings were especially interesting and beneficial to those present by the adoption of a new feature. At each meeting, an expert discussed some particular phase of activity that was of unusual interest to Government lawyers and private practitioners.

Louis Spector, Chairman, Army Panel, Armed Services Board of Contract Appeals, spoke on recent significant ASBCA cases.

Kendall M. Barnes, Assistant Chief, Court of Claims Section, Department of Justice, discussed Court of Claims practice.

Cdr. John Malloy, Office of the Secretary of Defense, spoke on "New Contract Cost Principles."

Commissioner Saul R. Gamer of the Court of Claims addressed the members of the meeting on "Selected Problems Related to Practice Before the Court of Claims."

A panel, composed of Geoffrey Creyke, Jr.; Bernard J. Gallagher; John Koehler, and I. H. Wachtel, discussed problems of interest they had encountered in their Government-contracts practice before boards and courts.

At the final meeting, each member gave his views on the most significant current development in Government contracts.

The remarks of the speakers were considered off-the-record.

Minutes of the monthly meetings were mailed to each member of the Committee. During the course of the year, the following Subcommittees were appointed:

Renegotiation Board matters (Chairman—John T. Koehler)

Liaison and Cooperation with the Hebert Subcommittee (Chairman—John T. Koehler)

Study and Drafting of Uniform Rules for Government Boards of Contract Appeals (Chairman—Paul H. Gantt)

Relations with DOD Officials re ASBCA Procedures and Gen-

eral Procurement Policies and Procedures (Chairman—Gilbert A. Cuneo)

Study of the Question of Physical Space Available for Contract Appeal Proceedings (Chairman—E. K. Gubin)

Special Liaison Subcommittee to the Senate Small Business Committee (Chairman—John W. Whelan)

The Subcommittees were very active throughout the year in carrying out their assigned duties. Most of the programs initiated during the past year have not been completed and the results cannot be stated at this time. Activity with regard to them is continuing though, throughout the summer months.

Respectfully submitted,
GILBERT A. CUNEO, *Chairman*

REPORT OF THE SECURITIES COMMITTEE

The Chairman of the Section designated as members of the Committee 32 persons who had indicated a desire to serve. In view of the size of the Committee, four subcommittees were organized to work in the following areas: (a) Securities and Exchange Commission Administration; (b) S. E. C. Practice and Procedure; (c) S. E. C. Decisions; and (d) Legislation. An outline of the functions assigned to the respective subcommittees is submitted with this report.

The principal work of the Committee this year has been carried on by the subcommittee on Commission Administration. The following report is based on the recommendations of that subcommittee, of which W. Crosby Roper, Jr., is chairman.

REPORT ON SECURITIES AND EXCHANGE COMMISSION ADMINISTRATION

Background Information

The need for consideration of means of expediting the day-to-day administration of the Securities and Exchange Commission is the culmination of developments over the past few years as a result of which the Commission's present staff is unable satisfactorily to handle the increased volume of work arising under the statutes it administers. The situation has become progressively more acute in the fiscal years ending June 30, 1959 and 1960. The problems are covered from the Commission's point of view in the Commission's 25th Annual Report and in the testimony and discussions at Congressional hearings. See Hearings on Major Administrative Process Problems Before Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., 425-534; Hearings on Independent Offices Appropriations for 1961, 86th Cong., 2d Sess., Part I, 272-369 (hereafter cited as "Appropriations Hearings").

It is helpful in considering the present situation to have available at least a rough comparison of work load, number of employees and appropriations over the past 10 years. The following tabulation shows for the fiscal years ending June 30, 1951 through June 30, 1959, with estimates for 1960 and 1961, the number of

registration statements filed under the Securities Act of 1933, the average number of Commission employees, broken down each year to show the number requested by the Commission, the number approved by the Bureau of the Budget, and the number finally authorized by Congress, and also the appropriation for each of these years:

Fiscal Year	No. of Reg'n Statements Filed	Employees * Requested by Commission	Approved by Bureau of Budget	Authorized by Congress	Corp. Fin. Div'n Employees at 6/30	Appropriations
1950	496	1,307	1,130	1,060	189	$5,878,250
1951	544	1,175	1,135	1,030	192	6,080,000
1952	665	1,127	1,050	907	167	5,813,480
1953	621	1,092	935	810	154	5,245,080
1954	648	1,080	938	744	146	5,000,000
1955	849	780	717	699	139	4,843,180
1956	981	734	734	730	153	5,278,000
1957	943	794	794	794	161	5,749,000
1958	913	935	935	855	171	6,935,000
1959	1,226	974	916	916	174	7,705,000
1960	1,600(est)	995	978	954	186	8,100,000
1961**	1,600(est)	1,135	1,088	..	240	9,300,000 (requested)

* Average figures, adjusted for estimated vacancies. For example, authorized positions for fiscal 1960 were 1,000.

** Figures reflect supplemental request submitted to Senate Appropriation Committee.

For additional work load statistics for the Corporation Finance and Corporate Regulation Divisions see the Appendix to the Commission's 25th Annual Report, Tables 6, 9, 16, 18, 19, 23 and 24.

The budgets submitted and approved for the years 1951 through 1955 showed a series of drastic reductions. The budget requests of the Commission for each year through fiscal 1954 sought from 100 to 200 more employees than had been authorized by Congress in the previous year. These requests were substantially cut back by the Bureau of the Budget and further cut back by Congress. In the request for fiscal 1955, submitted to the Bureau of the Budget in the last half of 1953, the Commission apparently accepted austerity. It asked 300 less jobs than it had asked for fiscal 1954. The positions authorized on the basis of that request—699—represented a 34% reduction from fiscal 1950.

Each year thereafter there has been a small staff increase. It is now clear, however, that the modest build-up was not sufficient to restore the agency to the position where it could handle in an efficient manner the expanding financial needs and investment resources of the economy. This fact is most dramatically demonstrated in connection with the processing of registration statements under the Securities Act of 1933. From the inception of the Commission until 1958, examination of registration statements had been geared to a schedule which permitted a competently prepared statement presenting no unusual problems to become effective in approximately 20 days, the time contemplated by the statute. The situation as described in January, 1960 to the Subcommittee of the House Appropriations Committee was as follows (Appropriation Hearings 277):

> "In 1956, 43 percent of the total number of registration statements examined were disposed of in less than 20 days, which is the time prescribed by statute. In fiscal 1959, this figure decreased to 25 percent. In the past 6 months, only 14 percent of the total number of registration statements examined were disposed of in less than 20 days. The average length of time within which an issuer or underwriter could expect to receive his first concrete indication of the particulars in which, in the opinion of our staff, his registration statement was defective or inadequate was, in 1958, about 14 days. As of December 31, 1959, it was about 26 days. So, too, there has been a progressive increase in the number of days elapsed from date of filing to date of disposal since fiscal 1956. As of the end of December, 1959, the total elapsed time for the average issue between filing of the registration statement to the effective date was 41 days. In June 1959 it was 31 days. During fiscal 1959 it was 28 days, and in fiscal 1958 it was only 24 days, which was about the average for 1948-58. In the past 18 months we have been forced on many occasions to advise underwriters and issuers that we would be unable to meet the time schedule either desired by them or established by law."

On March 31 the Commission released a statement of its Chairman reading in part as follows:

> "Edward N. Gadsby, Chairman of the Securities and Exchange Commission, today announced that during the current month through March 30, 253 registration statements were filed proposing the public offering of securities in the amount of $2.5 billion. This represents a record volume of filings for any month in the history of the Commission. The 253 filings are to be com-

pared with the previous high of 171 filings for March 1959 and 147 for March 1937, the third high figure for March filings."

"As of March 30, a total of 414 pending registration statements were under examination and review by the Commission's staff, also an all-time high for pending statements in the history of the Commission. Also pending and under review on that date were 241 post-effective amendments to registration statements covering public offerings of securities begun at an earlier date but not yet completed.

"Chairman Gadsby observed that, while every effort will be made to examine these registration statements and amendments as promptly as possible for compliance with the Securities Act disclosure requirements, it is obvious that there will be some delays in the completion of the examination process and the issuance of letters of comments thereon by the staff. Registrants, underwriters and the public generally are urged to hold to a minimum during the next thirty days their inquiries concerning the status of cases, since such inquiries and the time required to respond to them will further delay the examination. Where possible, inquiries should be deferred if they can reasonably be dealt with at a later date."

Conference with Commission Staff

A conference of members of the Subcommittee and of the Commission staff was arranged through the good offices of Mr. Meeker, the Commission's General Counsel and Vice-Chairman of the Committee on Securities. The meeting was held on March 11, 1960 at the Commission's offices. It is indicative of the interest of both Bar and Commission in the problems under consideration that two members of the Subcommittee came from New York and from Chicago to attend, and that 11 senior members of the Commission staff participated. A summary of the discussion at the meeting prepared by the Commission's staff was furnished to Subcommittee members.

The discussion which follows does not review in detail the topics discussed at the conference, but covers several matters which appear to merit either a present recommendation or further study looking toward future action. In such discussion use has been made of the background material summarized above, the published reports from which it was taken, the summary of the conference, and certain material contained in notes on the conference but not included in that summary.

Analysis and Recommendations

1. *Budget Requests and Appropriations.*

The Committee recognizes that the Commission's over-all obligation under the statutes it administers is the protection of public investors. One part of this responsibility is administering the full disclosure requirements of the Securities Act and the similar requirements and related regulatory provisions of the Investment Company Act and other acts. Another important part is enforcement of the antifraud and similar regulatory provisions of all the acts administered by the Commission, including the initiation and prosecution of necessary investigations to discover frauds and violations of the acts, and the bringing of administrative, civil and criminal proceedings to prevent and punish violations. In their planning, their budget requests and their administration those responsible for the Commission's operations must necessarily exercise an over-all judgment as to what aspects of the Commission's work must be emphasized in order best to protect the broad interest of the investing public.

At the same time, the Committee feels that legitimate financing, which can be consummated only after the Commission has processed the filings required by statute, must not be delayed and subject to substantial resulting handicaps while the Commission pursues the fraudulent and the careless.

We recognize that the Commission makes its budget requests on the basis of future estimates and that present work load under the 1933 Act was not fully foreseeable. Allowing for this fact, it is debatable whether the Commission in its requests for appropriations and in its allocation of available manpower took sufficiently drastic action to forestall the really serious breakdown in processing 1933 Act registrations and registrations and applications under the Investment Company Act of 1940. It is perfectly clear in retrospect that the budgets approved by the Budget Bureau on the basis of Commission requests and the appropriations authorized by Congress were inadequate.

Despite the fact that before the end of fiscal 1959 it was becoming increasingly apparent that efficient administration of the disclosure provisions of the 1933 and 1934 Acts and the registration and related provisions of the Investment Company Act was suffering, budgeting for 1960 emphasized the Commissions regulatory and enforcement functions. Out of 47 additional positions au-

thorized for fiscal year 1960 only seven were assigned to the examining branches and one to counsel's office in the Division of Corporation Finance, five to Investment Company Act administration and one to counsel's office in the Corporate Regulation Division. Twenty-three positions were assigned to regional offices, representing primarily enforcement activities, three were assigned to enforcement activities of the Trading and Exchange Division, and the balance to executive and housekeeping functions.

Out of 92 new positions covered by the Budget Bureau approved request for fiscal 1961, 23 (of which nine are stenographic) were earmarked for examining branches in Corporation Finance and two to investment company regulation. Four additional Corporation Finance positions were for Filing and Reports and five for the branch of Administrative Proceedings and Investigations (primarily enforcement). Thirty-nine additional positions were assigned to regional offices, two to the office of General Counsel, two to the Office of Hearing Examiners and four to enforcement in the Trading and Exchange Division, all again primarily for work on enforcement activities. In assessing the adequacy of the 23 additional positions for 1933 Act examinations it is appropriate to consider the statement in the Commission's own 1961 budget justification that

> ". . . it is doubtful whether the existing time element of 35 days will be reduced since the additional manpower is required to meet the increase in workload. This situation is prejudicial to underwriters and issuers in the marketing of securities and in some instances, to the public security holders of the companies." Appropriation Hearings 329-30.

That statement was written some months ago. The "35 days" was an average and the Commission's statement notes that "During recent month[s], it has been impossible to complete the *initial examination* of registration statements in many instances within 5 to 7 weeks after filing." *Ibid.* [Emphasis added.] As of December 31, 1959 the average had already become 41 days.

The Committee feels that it would be most unfortunate if, after 25 years of adhering to a 20-day registration schedule, the Commission were now to conclude that a 50 or even a 35-day schedule would have to do. Restoration of the 20-day schedule should be the first objective of the Commission. The House Committee on Appropriations recognized this in its recommendation on the

Commission's 1961 budget of 46 additional positions, all for the Division of Corporation Finance. H.R. Rep. No. 1519, 86th Cong., 2d Sess. 15 (1960). It is understood that in its presentation to the Senate Committee on Appropriations, revised and supplemented in the light of the experience since January 1, the Commission has requested 38 such additional positions.

2. *Recruiting and Management of Personnel.*

The Committee understands that the Commission presently has under way a management survey by outside management consultants. It is suggested that one area that should be explored is the possibility of an administrative setup and building of a staff which permits considerable flexibility in the assignment of personnel to different phases of the Commission's activities. As already indicated, substantial additional staff is required to take care of the present crisis in connection with processing of 1933 Act registrations and applications under the Investment Company Act. No one can predict with certainty how long the present heavy work load in this area will continue. If the pressure lessens here, then it should be possible to reassign personnel of the examining branches to enforcement activities, investment company inspections or other areas of the Commission's work where a backlog may have built up. This obviously involves not only flexibility in administrative arrangements, but selection and training of personnel to provide sufficient versatility so that they can work efficiently in different areas of Commission activities. Those responsible for Commission administration assure the Committee that reassignments and similar administrative measures have been utilized to the full extent feasible under present conditions of immediate pressure in all phases of Commission activity. The greater flexibility which appears desirable is a longer-range project which assumes training and assignment of staff on some other basis than each day's immediate needs. Rigid limitations arising from the manner in which budgets are prepared, or from specific limitations in appropriation acts such as that currently recommended by the House Appropriations Committee seem undesirable.

In this connection reference should be made to one matter brought out at the conference with the Commission staff and not mentioned in the staff summary. It was stated that present prob-

lems in the Corporation Finance Division are aggravated by the fact that the severe reductions in force effected in the years 1951 through 1955 had eliminated able junior personnel, which would now have 5 to 10 years experience and the skills desperately needed to bolster the examining branches. Particularly as career staff of the Commission with many years of experience retires, it will be important to the maintenance of high quality in the agency to have a reservoir of experienced people to serve as replacements. This need will not be met by hiring good college and law school graduates whose objective is a comparatively brief experience with the Commission to be followed by a position in business or private law practice.

Flexibility in staff assignments and restraint on the part of the Bureau of the Budget and Congress in lopping off staff if there is a temporary lull in Commission activity should help to prevent a recurrence of the present experience.

The Commission's staff strongly urges eliminating the ceiling on the so-called "super grades," GS 16-18, paying $14,190 to $17,500 per annum, as a method of alleviating personnel problems. The total number of such grades for all agencies (with a few exceptions) is now fixed by Congress, and they are doled out by the Civil Service Commission to the agencies showing the greatest need. The Commission has 1 GS-18, 4 GS-17's and 10 GS-16's.

The staff urges that sufficient super grades to make a reasonable number available for the long term career employees is important for the purpose of holding the ablest and most experienced Commission personnel, and also to provide an incentive to younger career employees to remain in the Government service with a reasonable prospect of some day achieving one of the super grades. An additional factor mentioned was that senior employees at the top of the regular pay scale may be reluctant to accept promotions involving increased responsibility and increased work if there is no commensurate financial reward.

This is a problem cutting across all Government operations. The Committee believes that the technical nature and importance of the Commission's work justify more than 15 staff positions paying $14,190 or better, and that additional expenditures to maintain the quality of personnel in top staff positions should be fully compensated by improvement in over-all quality and performance at all staff levels. The situation may not be the same in all agencies. The matter appears one for exploration by the full Section.

3. *Proposals to Increase Fees Payable in Connection with Registration Statements and Certain Other Securities Transactions.*

Fees are presently payable in connection with filing of registration statements under the Securities Act and qualification of trust indentures under the Trust Indenture Act. Such fees exceeded $1,582,000 in 1959. In addition, stock exchanges pay a fee of 2¢ per $1,000 on stock exchange transactions, amounting currently to about $800,000 per annum. The proceeds of these fees are not retained by the Commission but are paid into the general fund in the Treasury.

Bills are pending in Congress (H.R. 2694 and S. 737) which would increase the fee for stock exchange transactions to 5¢ per $1,000 and would impose a fee at the same rate on over-the-counter sales by brokers and dealers. Enactment of these bills would increase stock exchange fees by an estimated $1,200,000 and would yield an estimated $1,000,000 on over-the-counter sales. Adding this $2,200,000 to amounts to be collected in 1961 on the present fee basis would provide funds equal to approximately 50% of the Commission's total requested appropriation.

The Commission's staff does not place much confidence in increased fees as a method of relieving budgetary problems. As a practical matter it is unlikely that Congress would authorize direct use by the Commission of the funds collected. At most, placing the Commission on a more self-supporting basis might perhaps help to obtain more favorable consideration by the Congress and the Bureau of the Budget of requests for adequate Commission staff, particularly if backed up by some organized support from the Bar and those interested in public financing.

An increase in the minimum filing fee under the 1933 Act may be appropriate, but an across-the-board increase in such filing fees does not seem justified since filing fees presently collected approximately equal the direct expense of the Corporation Finance Division.

4. *Additional Tools for Attorneys Practicing before the Commission.*

The Commission staff is not optimistic as to the possibility of alleviating their problems through some form of publications designed to educate the practitioner who encounters a registration statement problem for the first time. They are clearly reluctant

to put any kind of seal of Commission approval upon a manual or other publication designed to accomplish this purpose. The members of the Subcommittee are divided on whether anything could be accomplished in this area. The topic is recommended for further consideration, perhaps in cooperation with the Committee on Federal Regulation of Securities of the Corporation, Banking and Business Law Section of the American Bar Association.

Since the preparation of the foregoing report, it has been called to the Committee's attention that Senator Harrison A. Williams, Jr., Chairman of the Securities Subcommittee of the Senate Committee on Banking and Currency and Senator Joseph S. Clark of the same Committee, in a letter of May 20, 1960 urged the Senate Appropriations Subcommittee to approve the full fiscal 1961 budget appropriation requested for the Commission. In support of their request, the Senators referred, among other things, to the current delay encountered in the processing of registration statements under the Securities Act of 1933 and the need for additional personnel.

Legislative Program

The report of the Committee for last year refers to the approval by the House of Delegates at its midyear meeting of certain resolutions sponsored by the Committee and the Section relating to the legislative program of the Securities and Exchange Commission. (See 11 Ad. Law Bull. 352-4.) Such resolutions opposed expansion of the Commission's authority to prevent withdrawals of registration statements under the Securities Act of 1933 and applications for registration under the Securities Act of 1934 and the Investment Advisers Act of 1940. The resolutions also proposed that all three Acts be amended to establish standards which would tend to insure that the Commission will act fairly whenever it seeks to bar withdrawal of such statements or applications. At hearings on the Commission's program held June 18, 1959 by the Securities Subcommittee of the Senate Banking and Currency Committee and July 18, 1959 by the Commerce and Finance Subcommittee of the House Interstate and Foreign Commerce Committee, the undersigned appeared in support of the Association's resolutions. Following the hearing before the Senate Subcommittee, a letter was addressed to the Chairman of the Subcommittee, commenting on certain statements made by Commis-

sion representatives with respect to the issues involved in the Association's resolutions.

At the date of this report the Commission's legislative program and the resolutions of the Association were still under consideration by the Committees of Congress.

C. Roger Nelson, *Chairman*

REPORT OF STATE ADMINISTRATIVE LAW COMMITTEE

In the year now ending the State Administrative Law Committee has continued to expand its files, initiated two years ago, relating to legislation in the various states concerning administrative practice and administrative procedure. These files are not yet complete, but substantial additional progress has been made. We now have information regarding a number of additional states and also are accumulating commentaries from members of our committee and others as to the operation of statutory law and the behavior of administrative agencies under statutory law in the various states.

Our committee, as reconstituted with a larger and more representative membership this year, has functioned well. Many of the members of the committee have taken a very active interest and to them goes the credit for the improvement in our files and our basic information as mentioned above.

With the improved and expanded data available, this committee has been able this year to respond, we believe and hope helpfully, to a number of inquiries from various states regarding administrative law problems and the experience elsewhere regarding such problems and their legislative solution.

By far the most important and time-consuming project of our committee this year has been in relationship to the newly proposed revision of the Model State Administrative Procedure Act which has been prepared in tentative form by the National Conference of Commissioners on Uniform State Laws. At the request of the National Conference, addressed to the American Bar Association and referred to this committee, our committee members have been giving substantial thought, comment and criticism to this proposed, revised Model Act. Unfortunately, not enough copies of the Model Act could be made available so that each member of our committee could have one for his own use. Consequently, the available copies have been circulated among members of the committee. Although not all members of the committee have responded, the great majority have and have provided to the chairman extensive and thoughtful comments, suggestions or criticisms. All of these responses are now in the process of correlation in the chairman's office. The process of correlation is

extensive, but will soon be completed after which a composite report will be prepared and circulated to all members of our committee for their information and general approval. This work will be concluded so that our suggestions and comments will be available by the time of the forthcoming meetings in Washington of the Administrative Law Section and the National Conference.

FREDERIC L. KIRGIS, *Chairman*

REPORT OF THE TRADE REGULATION COMMITTEE

I

Organization of Committee

As the initial step in organizing the Committee's work, the Chairman circulated a questionnaire to the fifty members of the Section who had indicated an interest in the Trade Regulation Committee's work. That questionnaire listed six administrative law problems as possible subjects of analysis and report by the Committee, requested the views of the members as to other administrative law issues of equal importance, and asked the members to indicate their preference for assignment. On the basis of the replies received, the following five subcommittees were organized:

1. The Primary Jurisdiction Doctrine, as Applied by Various Agencies Administering the Antitrust Laws:—Its Administrative Rationale.

2. Administrative Law Problems Raised by Federal Trade Commission Orders:—Scope, Specificity and Compliance.

3. Consent Procedures of the Department of Justice and the Federal Trade Commission:—Their Administrative Features.

4. The Federal Trade Commission's New Robinson-Patman Program:—The Relation Between Consultation and Enforcement Procedures.

5. Trade Practice Conferences:—Their Utility for Administrative Rule Making and Enforcement.

The assignment of each of the foregoing subcommittees has been carefully defined so as to focus on administrative law considerations and to avoid duplication with the work of the Association's Antitrust Section. In addition, liaison has been maintained with the latter Section.

Considerable interest was expressed in the sixth topic circulated for prospective committee consideration, "Requisites of an Administrative Record for Economic Issues:—Problems of Proof and Procedure," but the ambitious nature of the program already under way led to the decision, for the time being, not to organize a subcommittee on that exceedingly difficult and complex topic.

A few replies to the questionnaire suggested that the Committee examine the administrative law problems of state regulatory agen-

cies. Organization of committee work on this important phase of the administrative process will depend on the more concrete delineation of critical problems in this area and on the availability of committee members for work on those problems.

II

The Federal Trade Commission's New Robinson-Patman Program:—The Relation Between Consultation and Enforcement Procedures

A subcommittee on the above subject, under the Chairmanship of Robert C. Barnard of Washington, D. C., after a preliminary review of the subject, met with the Federal Trade Commission Staff Committee studying the Robinson-Patman Act in Washington, D. C., on March 28, 1960. At that meeting there was discussion of the following subjects:

(a) *Robinson-Patman Act Guides to be Published by the FTC.* The Federal Trade Commission has completed and expects to publish in the near future guides on Sections 2(d) and (e) of the Robinson-Patman Act. The guides are addressed to the business community and are not expected to be a detailed legal discussion. The Committee will study the guides upon their publication and will submit comments to the Federal Trade Commission either directly or at a subsequent meeting.

(b) *Enforcement Procedures—Stipulation.* At the meeting in Washington on March 28 views were exchanged informally between the Subcommittee and the FTC Staff Committee on the Subcommittee proposal that the Commission consider the feasibility of using the stipulation procedure now used in non-monopoly cases for disposition of Robinson-Patman Act cases. The exchange of views resulted in the proposal that the Subcommittee consider its proposal further and present further views as to the use by the Commission of the stipulation procedure or some other procedure which would meet the requirements of speedy disposition of the cases and adequate assurance that the practice would not be resumed.

(c) *Advance clearance of practices.* The Subcommittee suggested that the FTC Staff Committee consider working out a procedure whereby rulings may be secured in advance of putting a practice into operation. An informal procedure exists at the present time but there is no formalized method of securing an advance ruling from the Federal Trade Commission.

There are under consideration recommendations to be made to the Commission with respect to new enforcement procedures and with respect to advance clearance on proposed business practices. The Subcommittee's suggestions, when they are ready, will be submitted to the Commission at another meeting with the FTC Staff Committee.

III

Trade Practice Conferences—Their Utility for Administrative Rule Making and Enforcement.

A Subcommittee on the above subject, under the Chairmanship of Malcolm A. Hoffmann of New York City, after preliminary review of the subject, met with members of the Federal Trade Commission Staff in Washington, D. C., on April 7, 1960. As a result of this meeting, it was agreed that an intensive study of the scope and nature of trade practice conferences and the use made by the Courts and the FTC of trade practice rules was necessary before any recommendations could be formulated. Consideration has been given to the possible utility of trade practice rules in situations where violations of the Robinson-Patman Act are current throughout an industry. Here the Commission might avoid the necessity for case by case litigation through the issuance of specific rules and industry members might obtain the advantage of simultaneous termination of the violation by all competitors.

The Subcommittee's future program is a twofold one, first, that of making a definitive study of trade practice rules and procedures, and, second, that of formulating recommendations as to new uses that may be made of such rules. Such suggestions as are developed will be taken up with the Commission's staff at another meeting.

IV

The Primary Jurisdiction Doctrine, as Applied by Various Agencies Administering the Antitrust Laws:—Its Administrative Rationale

A Subcommittee on the above subject, under the Chairmanship of Worth Rowley of Washington, D. C., has embarked on the preparation of a report analyzing, on an agency-by-agency basis, the administrative law criteria bearing upon the primary jurisdiction doctrine. There will be listed and described, for each of the principal administrative agencies, the factors affecting the ap-

plication of the doctrine of primary jurisdiction with respect to that agency, and this from the administrative law point of view. For example, a matter may be considered to be within the primary jurisdiction of one agency principally because that agency is regarded as the fact expert whose know-how ought to be available to a court sitting in judgment on the matter. Again, a matter may be within the primary jurisdiction of an agency because of a need for uniform policy formulation, or for coordination with respect to other matters.

It is not proposed to restudy the doctrine of primary jurisdiction. A fine job was done on this by the ABA Section of Antitrust Law in August 1958. What is proposed is an agency-by-agency analysis of the relevant administrative law criteria bearing upon the doctrine.

V

Consent Procedures of the Department of Justice and the Federal Trade Commission:—Their Administrative Features

A Subcommittee on the above subject, under the Chairmanship of Robert C. Keck of Chicago, is studying, and will make recommendations concerning:—

(a) The possible need to broaden the scope of trade regulation matters now subject to FTC consent procedures;

(b) Use of consent procedures to avoid inequitable application of a rule to members of an industry;

(c) The need for terminal or termination provisions in consent orders; and

(d) Ways and means of encouraging use of consent procedure to lighten litigation dockets.

VI

Administrative Law Problems Raised by Federal Trade Commission Orders: Scope, Specificity and Compliance

A Subcommittee, under the Chairmanship of John T. Loughlin of Chicago, is studying and analyzing the above problem, with special reference to the Robinson-Patman Act cases. The importance of this problem and the need for making practical recommendations with respect to it has been accentuated by the Commission's interpretation of Public Law 86-107 signed by the President July 23 last, extending the application of the penalty legislation to

old as well as new cease and desist orders issued under the Clayton Act as amended by the Robinson-Patman Act.

VII

General Comments

No report of this nature would be complete which did not make due acknowledgment of the splendid co-operation which the Committee has received from Mr. Robert Parrish, Secretary of the Federal Trade Commission, Mr. John Heim, Chairman of the Commission's Bureau of Consultation, Mr. Eugene Grandey, Assistant General Counsel, and members of the Commission's Staff Committee on the Robinson-Patman Act and other FTC officials. As Government officials, they of course cannot be held specifically responsible for the Committees' recommendations in this field, but the ultimate success of the committees' work will be in large measure due to their participation in it and to the information and insight that they have made available to the Committee.

While the different subcommittees of the Section are working in different areas, there is a common administrative problem which cuts across the work of three of the subcommittees, those on the FTC's New Robinson-Patman Program, Trade Practice Conferences and Consent Procedures of the Department of Justice and the Federal Trade Commission. This problem, one phase of which was developed in the *Moog Industries case,* 355 U.S. 411 (1958), is the problem of industry-wide, as opposed to selective, enforcement of trade regulation orders. Counsel for private litigants and respondents have complained that selective enforcement is unfair to the individual concern sued and have stated that, as a practical matter, many undesirable industry practices could be eliminated if the industry as a whole were legally bound to desist from the practices. Counsel for the Government have enforcement responsibilities which they must discharge as the evidence of individual violations presents itself. The basic problem being examined by the Committee is whether the public interest served by the FTC and the legal rights of businessmen would be better served by voluntary or consent procedures which would produce industry-wide compliance with the objectives of the law enforcement agencies of Government. The work that is being done by the three subcommittees dealing with different phases of this common problem will be co-ordinated, with the view toward achieving basic solutions.

SIGMUND TIMBERG, *Chairman*

MINUTES OF MIDYEAR MEETING OF COUNCIL

EDGEWATER BEACH HOTEL—CHICAGO, ILLINOIS

FEBRUARY 20 AND 21, 1960

The meeting of the Council of the Section of Administrative Law convened with a luncheon at 12:00 noon February 20, 1960, in the American Room, Edgewater Beach Hotel, following immediately thereafter with the business meeting.

Attendance: All officers and other members of the Council, except William I. Denning, were present. In addition, approximately 25 other members of the Section, including many chairmen and vice-chairmen of committees, were present.

I. AGENDA

A tentative agenda was distributed and approved.

II. MINUTES

a. The minutes of the 1959 Annual Meeting of the Council were approved.

b. The minutes of the September 1959 mail ballot to fill vacancy on the Council were approved.

III. LIAISON WITH SECTION OF PUBLIC UTILITY LAW

Clarence H. Ross, Chairman of the Section of Public Utility Law, was present and urged close cooperation and coordination between the two Sections. This is needed, in his opinion, in order to further the over-all legislative objectives of the Bar Association. Willard Gatchell joined in the plea for coordination between the activities of the two Sections. John W. Cragun expressed the view that this Section is primarily concerned with procedural aspects, and while the problem of overlap does exist, it is not limited to the Public Utility Law Section. He also pointed out that the Special Committee on Legal Services and Procedure, and its subcommittees—which are committees of the Association and not of any Section—are charged with the responsibility for implementing the legislative objectives embodied in the Sellers committee report

and recommendations which were adopted by the House of Delegates and are now in legislative form in S. 600, etc.

Raoul Berger expressed the view that the matter should be weighed carefully; that while there is duplication, any position taken before Congress must be cleared by the House of Delegates and, thus, there is no ground for fear of conflicting positions on behalf of ABA.

John B. Gage urged closer liaison but does not want to transgress upon policy which has been established by the House of Delegates through the establishment of Committee on Legal Services and Procedure; but expressed the opinion that it would be good, however, to know the views of other Sections. Donald C. Beelar pointed out that when he was chairman of the Section of Administrative Law he sent copies of all reports of Section committees to other interested Sections and committees; that he is in favor of exchange of information between Sections but not of coordination of their recommendations to the Association. Thomas G. Meeker advised that the Corporation, Banking and Business Law Section is also interested in what the Section of Administrative Law does.

Chairman Kintner stated the view that reports of committees of the Administrative Law Section should be made available to other Sections and Standing Committees of the Association by the Secretary of the Section. The Secretary pointed out that distribution of the committee reports are made by the National Committee of the Section and the Chairman of the Section then observed that the Secretary of the Section should see that such distribution is made.

J. David Mann, Chairman of the Committee on Gas and Electric Power, recommended coordination with other Sections. Albert G. Stephan spoke of his experience as chairman of the Ad Hoc Committee of the Section on ex parte influence and referred to actions of the House of Delegates on the subject in Atlanta, Los Angeles and in Chicago. He expressed the view that liaison must be a two-way street to be effective. Arthur J. Doyle, Vice-Chairman of the Committee on Natural Resources and Interior Matters, said he has difficulty in keeping informed as to what is going on in the substantive law sections and the effect of such activities on procedural aspects and vice versa. Harold L. Russell expressed general approval of necessity for liaison, but pointed out that the scope thereof needs some further study.

Whitney R. Harris, Vice-Chairman of the Section, expressed

the view that active liaison should be maintained wherever possible, but questioned coordination at committee level except on individual member basis; that the actual coordination should be at Council level; that problems exist since the Councils meet at the same time; and that area needs to be explored to determine what can be done.

Frank C. Newman then moved that the Chairman, either himself or through a special committee, or committees, review the function of information exchange and other liaison functions involving units of the American Bar Association; that a report be made at the next Council meeting; and that the Chairman make additional liaison appointments if they seem appropriate. The motion was duly seconded and adopted.

The Chairman then designated two committees:

(1) A committee for liaison with the Section of Public Utility Law, to which he named Harold L. Russell, John B. Gage and Whitney R. Harris and designated Mr. Russell as chairman.

(2) A committee for liaison with other Sections and Standing Committees of the Association, to which he named Whitney R. Harris, Frank C. Newman and Harold L. Russell, and designated Mr. Harris as chairman. Mr. Kintner also requested that Mr. Harris and his committee advise him from time to time as to other liaison appointments which should be made.

The special committee appointed to consider ways and means of liaison with the Section of Public Utility Law met with representatives of that Section on Saturday evening, February 20th and reported back to the Council meeting on Sunday morning, February 21st. Mr. Russell, as chairman of the committee, reported that he, Mr. Gage and Mr. Harris, on behalf of the Section of Administrative Law, met with Mr. Ross and Mr. Gatchell, on behalf of the Section of Public Utility Law, and there resulted "a mutual taking into camp." After some further discussion, Mr. Russell moved that the Council approve the procedure generally agreed upon between the representatives of the two Sections, as follows:

"1. The Chairman of each Section will appoint one person nominated by the Chairman of the other Section to each committee of his Section for which a nomination is made, said nominee to be a member of both Sections and acceptable to the Chairman of the Section making the committee appointment.

"2. The secretary of each Section shall forward to the secretary of the other Section copies of committee reports, agenda and

minutes; such distribution shall to the extent practical be made at the same time as those materials are distributed to Council and/or Section members, whichever is earlier.

"3. The Council of each Section upon any matter considered by it shall hear the views of a designee of the other Section upon request of the chairman of the other Section."

The motion was seconded by Mr. Stephan. After some discussion, Mr. Stephan obtained agreement of Mr. Russell to amend the motion by adding the following language as a fourth part:

"4. This program is to be on an experimental basis for a one-year period only and is to be reviewed at the next Midyear Meeting of the Council."

Mr. Cragun discussed the matter at some length and questioned the advisability of adopting the motion, pointing out, among other matters, that the Public Utility Law Section is not a "working" section as is the Administrative Law Section. Mr. Beelar stated that while he approved the objective of the motion in principle, he questioned the right of the chairman of another section even to nominate a committee member; and that he believes that we should preserve the rights of the chairman.

Valentine B. Deale expressed general agreement with the Beelar viewpoint.

In answer to Mr. Cragun, Mr. Russell expressed the opinion that there has been a "reawakening of interest" among the members of the Section of Public Utility Law and such section has become increasingly interested in legislation.

Pursuant to the request of the Secretary for clarification, Mr. Russell stated that the motion contemplates that only one copy of any document need be furnished to the Secretary of the Section of Public Utility Law. He further stated in reply to another question that the liaison on a committee would not have the authority to speak for his section on any matter before the committee.

Mr. Newman moved to strike the first section of the motion, suggesting that there is ample opportunity for each section to make its own study. Mr. Berger seconded the motion to strike. Mr. Stephan inquired whether it is contemplated that the proposed arrangement is temporary or permanent. Mr. Harris stated that it is an experiment. Mr. Stephan then obtained the consent of Mr. Russell to add part "4" hereinabove set forth.

Mr. Deale questioned whether the first part is needed and asked why the Public Utility Section is singled out from all others in the association.

Mr. Gage stated that the proposed procedure would not become effective unless and until the Council of the Section of Public Utility Law also approves the arrangement. The motion to strike was put to a vote, resulting in 6 votes for and 8 against. Thus, the motion was not adopted.

Mr. Beelar then moved to amend the main motion to state that the policy of this proposal be implemented by invitation to all other sections and committees that are interested in administrative law. Mr. Cragun seconded the Beelar motion. Mr. Russell then agreed to add a fifth part to the main motion, as follows:

"5. The Chairman of the Section is authorized and instructed to extend similar invitation to other sections and committees on a reciprocal basis."

The Russell motion, consisting of five parts hereinabove quoted, was then put to a vote and adopted by a divided vote. While there was at least one abstention, only Mr. Cragun asked to be recorded as casting a negative vote.

IV. Committee Reports [1]

1. *Immigration and Nationality*

Gustav Lazarus, chairman of the committee, presented an interim report of this committee; such report had been circulated and a copy thereof is attached to the master copy of these minutes. Mr. Newman expressed the view that the Council could then consider Resolution No. 3, of the committee, 11 Ad. Law Bull. 298. Mr. Berger endorsed the Newman viewpoint. The Council then voted to consider said Resolution (No. 3). After some further discussion, Mr. Newman moved that Resolution No. 3 and the implementing legislation be approved. The motion was seconded by Mr. Berger and adopted. Mr. Beelar then moved that a request for waiver be made so that the matter could be considered by the House of Delegates at the 1960 Midyear Meeting. The motion was seconded by Frank C. Newman and adopted.[2] Chairman Kintner asked that Mr. Lazarus brief him and Mr. Cragun for the presentation of the matter to the House of Delegates.

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[1] In addition to reports of committees presented at the meeting of the Council, see the reports discussed in the Extension to the Minutes made by the Chairman of the Section attached hereto.

[2] The waiver was obtained and Resolution No. 3 was presented to the House of Delegates along with Resolutions No. 1 and No. 2, which had been approved by the Section at Miami Beach. All three resolutions were adopted by the House of Delegates. See 11 Ad. Law Bull. 297-298 for text of resolutions.

2. *Trade Regulations*

Sigmund Timberg, chairman of this committee, made an oral report on the scope of the activities of the committee, stating that there are six subcommittees with 12 to 15 members each.

3. *Agriculture*

Frank B. Lent, chairman of this committee, also made an oral report on the work of his committee. A copy of such committee's interim report is attached to the master copy of these minutes. Mr. Stephan suggested that Mr. Lent and his committee make suggestions to Professor Cornelius Peck and his committee on Code of Agency-Tribunal Standards of Conduct.

4. *Aviation*

Richard H. Keatinge, chairman of the committee, reported that his committee is studying a number of projects, including proposed organization of CAB bar association, Hector memorandum, and ex parte representation, as well as a follow-up of past activities of the committee. The committee has a two-man liaison with the Standing Committee on Aeronautical Law.

Franklin M. Stone expressed the view that jurisdiction of the Hector memorandum should be established since he understands that four committees want to talk about it. Chairman Kintner stated that it certainly belongs to the Aviation Committee but that the subject matter also cuts across other fields. Mr. Stephan agreed and named the Committees on Improvement of Administrative Procedure, Administrative Procedure Act, Code of Agency-Tribunal Standards of Conduct, and Aviation, as particularly interested in the subject.

Reference was made to a number of articles dealing with the Hector memorandum, including the D. C. Bar Journal, Illinois State Bar Association, Yale Law Journal and others, now—or in the near future to be—published.

Mr. Beelar referred to Dirksen bill (S. 2849). Bryce Rea expressed the view that departmentalization can be carried too far and that it would be a mistake to limit consideration but felt that those committees considering study of the Hector memorandum should keep in touch with the National Committee to avoid too much duplication of effort. Mr. Russell stated that the Aviation Committee is the group most qualified to appraise the subject mat-

ter since it deals with CAB. Mr. Russell also stated that a CAB bar association has been under consideration for 15-20 years.

Mr. Russell referred to Resolution No. 2 of the Aviation Committee's report at the 1958 Los Angeles Meeting. After some discussion, Mr. Keatinge, present Chairman of the Aviation Committee, stated that his committee would make a concrete recommendation on the matter. Mr. Russell moved that the Aviation Committee reconsider congressional appearance matter and make recommendation for action by Section at the Annual Meeting. The motion was seconded by Mr. Newman. The motion was later withdrawn and no vote taken. Chairman Kintner referred congressional appearance matter to Aviation Committee for report.

The meeting adjourned at 4:30 P. M. to reconvene at 10:00 A. M., February 21.

5. *Federal Register*

Alvis Layne, Jr., chairman of the committee, commented on his report, a copy of which is attached to the master copy of these minutes. David Eberhard, director of the Federal Register, commented on future plans for improvement of the publication. Mr. Newman commented on the importance of Code of Federal Regulations and the need for wider distribution. Mr. Rea expressed the view that the Code of Federal Regulations needs attention and stressed particularly the poor quality of the index thereto. Mr. Eberhard stated that aid from the committee and others would cut down delay in desired improvement. Mr. Newman stressed that the solution of the problems discussed is not just a committee job, but one which will require assistance; that there is a great need for a good Code of Federal Regulations. Mr. Newman referred to the looseleaf system used in California and suggested study of looseleaf system. It was the consensus of the Council that the Committee of the Federal Register has done an excellent job and that any suggestions for its consideration should be sent to it.

6. *National Committee*

Bryce Rea, Jr., Chairman of the National Committee, reported orally on the legislative activities of the committee. He stated that provisions of H.R. 2156, H.R. 2157 and H.R. 1900 would amend

the Criminal Code and are not properly within the jurisdiction of this Section; that other provisions refer to the subject matter covered by S. 600, which is the responsibility of the Special Committee on Legal Services and Procedure; and recommends that the bills be referred to the Criminal Law Section and Special Committee on Legal Services and Procedure, who have jurisdiction of the matter. Mr. Beelar reported that these matters are on the agenda of Mr. Deale's subcommittee of the Special Committee for Title IV of S. 600; that he concurs with Mr. Rea except as to H.R. 2157, which he thinks is the joint interest of the Section and the Special Committee; that the Section and Special Committee are authorized to state general position of the Association. Chairman Kintner asked Mr. Rea to prepare letter and also instructed Mr. Rea and Mr. Deale to attend the hearings.

Mr. Gatchell expressed the view that H.R. 2156 should be referred to the Committee on Representation before Administrative Agencies. Mr. Gatchell and Mr. Harris expressed belief that the Section should participate jointly with the Criminal Law Section. Chairman Kintner asked Mr. Rea to send a copy of the bill to Matthew E. McCarthy, Chairman of the Committee on Representation before Administrative Agencies, for his consideration. Mr. Meeker suggested that the Committee on Representation before Administrative Agencies confer with the committee of the Bar of the City of New York which has done a great amount of work on the subject. No formal action was taken.

7. *Agency Rule Making*

Victor G. Rosenblum, chairman of this committee, stated that his committee will have a report before the August meeting.

8. *Budget and Finance*

Herman Tocker, chairman of this committee, was unable to be present at the Midyear Meeting due to illness, but had provided a written report which was discussed. A copy of such report is attached to the master copy of these minutes. This report shows that, as of February 20, 1960, and subject to unreported Headquarters charges, the "actual cash balance" of the Section was $10,070.54. Among major items of expense which must be met from this balance are the cost of Midyear Meeting travel, the Annual Meeting, and the cost of three issues of the Bulletin.

Upon motion duly made, seconded and adopted, and in accordance with past practice, an advance of $500.00 to the Chairman of the Section was authorized for expenses in connection with the Annual Meeting.

Upon motion duly made, seconded and adopted, and likewise in accordance with past practice, an advance of $2,500.00 to the Lord Baltimore Press was authorized from the funds of the present fiscal year toward the expense of the summer issue of the Bulletin which carries committee reports of the current year but which will be published during the next fiscal year.

9. *Code of Agency-Tribunal Standards of Conduct*

Chairman Kintner referred to the report of Professor Cornelius Peck, chairman of the committee, which had been distributed to Council members; a copy of such report is attached to the master copy of these minutes.

10. *Organization and By-Laws*

A copy of the report of the committee is attached to the master copy of these minutes. Jesse E. Baskette, vice-chairman of the committee, discussed the question of the possible overlap of jurisdiction of the Committee on Organization and By-Laws and that of the Committee on Committees.

After some discussion, Mr. Harris moved that the jurisdiction of the Committee on Committees be limited to suggestions as to committee membership make-up and that the remainder of the jurisdiction originally conferred upon such committee be transferred to the Organization and By-Laws Committee. The motion was duly seconded by several and adopted.

Mr. Berger suggested that those members of committees who do not work be "booted off" and way made for those who will respond to the communications from the committee chairman and help in the activities of the committee. Mr. Deale expressed the view that it is a "faulty approach" to put on committees all those who indicate such desire. Mr. Kintner stated that it was too late to change policy for this year and that he is opposed to "round robin of a few." Mr. Keatinge offered the suggestion that committee chairmen might be asked to "rate members in 1, 2, 3 order" and also to rate vice-chairmen. Mr. Cragun agreed that there is truth in all of the observations expressed and emphasized that committee

chairmen must be selected who will work. Mr. Beelar stated that he has an open mind on the matter; that there will always be "wallpaper committees and working committees"; that committee chairmen are, in his view, more important than Council members; and that small committees do the best work. He also pointed out that ABA has only seven members on Standing Committees.

11. *Communications*

Percy H. Russell, Jr., chairman of the committee, was not present. A report from this committee was circulated and a copy is attached to the master copy of these minutes.

12. *Hearing Examiners*

Jesse E. Baskette, chairman of the committee, commented on the written report, a copy of which is attached to the master copy of these minutes. Matters such as selective certification, the Dirksen bill (S. 2849) and the Morrison bill (H.R. 10114) were discussed. The Morrison bill would provide Grade GS-18 for all Hearing Examiners at the Federal Trade Commission. It was the consensus of the Council that Mr. Baskette, as chairman of the Hearing Examiner Committee, can and should support such bill under the policy of the ABA that all Hearing Examiners throughout the Federal Government should have the GS-18 classification; that this would be an opening wedge and he could hammer home the position of the ABA as to all Hearing Examiners. Mr. Kintner emphasized that in the event consideration is given to two grades it should be emphasized that there should be only one grade for all Hearing Examiners at an agency.

Mr. Beelar moved that the Dirksen bill (S. 2849) be assigned to a special committee, to be appointed by the Section Chairman, for study and report to the Annual Meeting. The motion was seconded by Mr. Berger and duly adopted.

Mr. Baskette also referred to a movement at N.L.R.B. relative to Hearing Examiners which would destroy gains achieved by the Administrative Procedure Act.

13. *Postal Matters*

William L. McGovern, chairman of the committee, commented on the report of this committee; a copy of which is attached to the master copy of these minutes. After some discussion, it was the

consensus of the Council that Mr. McGovern should be empowered to confer with the Section on Criminal Law relative to pending legislation and to obtain a joint position, if possible, Mr. Kintner so directed.

A letter from William I. Denning relative to H.R. 7379 was read in which he expressed opposition to such bill. Mr. Cragun pointed out that the House of Delegates and Board of Governors had taken a position on mail impounding, lottery and obscenity, and made reference to resolutions concerning those matters.

14. *State Department and Foreign Commerce Matters*

The report of this committee and accompanying recommendation that such committee participate in a Midwest conference on foreign commerce which had been distributed is attached to the master copy of these minutes. After some discussion of this matter, in which it was pointed out that such participation would require approval of the Board of Governors—often hard to obtain—it was moved that the matter be tabled. The motion to table was duly seconded and adopted.

15. *Administrative Procedure Act*

Leo Huard, chairman of this committee, reported that he has more than 100 members and is in the process of setting up subcommittees.

16. *Interstate Commerce Act*

The chairman of this committee, Harry J. Breithaupt, Jr., reported on the organization of the committee in letter form; a copy of such letter is attached to the master copy of these minutes.

17. *Securities*

C. Roger Nelson, chairman of the committee, who was unable to attend the meeting, made an interim report on the organization of the committee; a copy of such report is attached to the master copy of these minutes.

18. *Improvement of Administrative Procedure*

Benedict P. Cottone, chairman of the committee, was unable to attend the Midyear Meeting but furnished a preliminary report

of the activities of his committee which was distributed at the meeting; a copy of such report is attached to the master copy of these minutes.

19. *State Administrative Law*

Frederic L. Kirgis, chairman of the committee, was also unable to attend the Midyear Meeting. He made an interim progress report in letter form; a copy of which is attached to the master copy of these minutes.

20. *Junior Bar Conference*

James J. Bierbower, chairman of the committee, furnished an interim report in which he pointed out that the primary objective of his committee is to channel JBC members into the Section. He also reported that consideration is being given to the presentation of "bread-and-butter" programs for younger lawyers in the field of administrative law. A copy of the interim report is attached to the master copy of these minutes.

V. Miscellaneous Matters

1. *Section Delegate*

At the beginning of the Sunday morning session of the Council meeting, Mr. Cragun, Section Delegate, reported generally on matters of interest to the Section of Administrative Law. He made particular reference to the proposed amendment to the By-Laws of the Association relative to the timely filing of Section Reports. (Item II of the Report of the Committee on Rules and Calendar.)

2. *Annual Meeting*

The general plans for the program for the annual meeting of the Section were discussed and Chairman Kintner advised that Bernard G. Gallagher, chairman of the Annual Meeting Committee, while unable to be present at the Midyear Meeting, was working on the program and had already arranged for Justice Tom C. Clark and Judge E. Barrett Prettyman to appear on the program. Mr. Berger suggested that Justice Frankfurter be asked to speak in view of his Oxford teaching experience and his wide acquaintance with the British legal profession.

3. *Administrative Law Bulletin*

Mr. Rosenblum, editor-in-chief of the Bulletin, discussed generally some of the plans for future issues of the Bulletin. He stated that a list of members of the Section would be carried in the next issue of the Bulletin.

4. *House of Delegates Requirement for 50 Copies of Bills*

There was discussion of the requirement that 50 copies of bills must accompany resolutions transmitted to the House of Delegates involving any such bill. Mr. Beelar made a motion to the effect that the Section recommend to the House of Delegates that the number of copies of such bills be reduced from 50 to 5. Mr. Cragun pointed out that the matter was already under consideration by at least certain members of the House of Delegates. Mr. Beelar then withdrew his motion.

5. *Extension to Minutes*

There is attached hereto and made a part hereof Chairman Kintner's Extension to Minutes, which relate to certain committee reports which contain no recommendations and were not presented orally during the Council meeting.

The meeting of the Council adjourned at 2:55 P.M., Sunday, February 21, 1960.

ELIZABETH C. SMITH, *Secretary*

EXTENSION TO MINUTES
CHICAGO

Chairman Kintner reported concerning activities of the following committees, in the absence of their Chairmen and Vice-Chairmen:

Mobilization—Chairman Frank X. Brown reported on February 17, 1960, of progress of his committee, which currently is studying proposed Price, Wage and Rent Stabilization measures to be placed in effect during periods requiring mobilization.

Membership—Chairman Mark Martin's efforts continue to be productive. The Section's membership stands at about 2100. In November, Mr. Kintner was advised that the Board of Governors had decided not to issue new ABA member lists to the various Sections for their use in membership solicitation, but would extend

a general invitation from headquarters for new members to join Sections of their choice. Mr. Kintner stated that he had protested this procedure, since for several years he had used these new member lists to greatly increase the Section's membership. Subsequently Mr. Stecher advised him that due to his protest and that of one other Section the matter would be reconsidered by the Board of Governors.

Labor Law Committee—Chairman Milton Denbo reported on February 17, 1960, that he had established two subcommittees to scrutinize, respectively, procedures put into effect by the Labor Department and the National Labor Relations Board under the recent Labor Reform Bill.

Natural Resources and Interior Matters—Chairman Robert L. McCarty had advised on February 15 that his committee was engaged in conferences with officials of the Interior Department on several problems of concern to the Section, including separation of functions in the Department. He reports that Solicitor Abbott and his assistant Kent Kratz indicate a desire to cooperate with the Committee.

Public Contracts—Chairman Gilbert A. Cuneo has reported several highly successful meetings of committee. Three subcommittees in operation are as follows: Subcommittee for Liaison and Cooperation with the Herbert Subcommittee; Subcommittee for Study and Drafting of Uniform Rules for Government Boards of Contract Appeals; and Subcommittee on Relations with DOD Officials re ASBCA Procedures and General Procurement Policies and Procedures.

Representation Before Administrative Agencies—Chairman Matthew E. McCarthy reported on February 18, 1960, that his committee is studying the effects of S. 1567. A second objective of the Committee this year is a study of elimination of nominal fees allowed to attorneys by certain Federal agencies. The Committee is checking each Federal agency and board as to the present status of fee allowances.

Securities Committee—Chairman C. Roger Nelson on February 16, 1960, reported that four subcommittees are active: Subcommittee on Commission Administration; Subcommittee on SEC Practice and Procedure; Subcommittee on Commission Decisions; and Subcommittee on Legislation.